

[*McCuiston v. Tennessee Valley Authority*](#), 89-ERA-6 (ALJ Feb. 1, 1990)

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Case No.: 89-ERA-6

IN THE MATTER OF:

FREDERICK E. MCCUISTION,
Complainant,

vs.

TENNESSEE VALLEY AUTHORITY,
Respondent,

RECOMMENDED DECISION AND ORDER

STATEMENT

The complainant, Frederick E. McCuiston is proceeding against the Tennessee Valley Authority (TVA) under Section 210 of the Energy Reorganization Act of 1974, 42 USC Section 5851 (1982) (ERA). On August 19, 1988, the complainant was employed by TVA at its Watts Bar nuclear plant (WBP) as a management-level employee-an instrumentation quality control unit supervisor-in TVA's division of nuclear quality assurance. On August 19, 1988 complainant filed a complaint with the Department of Labor under Section 210 of the Energy Reorganization Act, 42 USC, 5851. Mr. McCuiston charged that his termination by TVA was caused by TVA's retaliation against him for his engagement in protected activity at TVA's Watts Bar nuclear plant.

On January 12, 1989 the Department of Labor (DOL) found in favor of Mr. McCuiston and concluded that Mr. McCuiston was discriminated against..."because of mr. McCuiston's refusal to participate in the violation of a stop work order....the report filed by a member of his group about the violation of the stop work order; the expressing of concerns by Mr. McCuiston's subordinates to the Employee Concerns Program and the Nuclear Regulatory Commission..." (NRC). (Exhibit C-52, DOL letter to Oliver Kingsley dated September 18, 1988 from Benny Edwards, Area Director).

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In its investigation, the DOL partially relied upon the investigative findings of the TVA's Office of Inspector General (OIG). The OIG began its investigation December 14, 1987. The OIG investigative report dated June 29, 1988 found that Mr. McCuiston was the subject of harassment and intimidation. (Exhibit C-64, report of administrative inquiry by investigator Brady Jones; Exhibit C-88, investigative report of Brady Jones).

The DOL ordered TVA to reinstate Mr. McCuiston to a position comparable to the position that he previously held, to pay him back pay and other benefits of employment, and to pay him attorney fees and costs (Exhibit C-52).

TVA timely appealed the decision and Mr. McCuiston timely appealed a portion of the decision. An administrative hearing on the DOL appeal was held in Knoxville, Tennessee from April 24, 1989 through April 28, 1989 and from June 6, 1989 to June 7, 1989.

SUMMARY OF THE EVIDENCE

STRUCTURE OF TVA OPERATIONS

TVA has two licensed nuclear plants (Browns Ferry and Sequoyah plant) and two under construction (Bellefonte and Watts Bar plants). Construction is nearly complete on the Watts Bar plant but an operating license has not been obtained. (Kazanas April 28 Tr. at 200-201 212-213; Nixon June 6 Tr. at 7-10).

After reviewing its nuclear program for conformance with NRC requirements, TVA shut down all of its operating units (Browns Ferry and Sequoyah) in 1985. At the same time, TVA began a recovery effort for its nuclear program, and in the last four years, TVA's nuclear program has undergone a massive review and restructuring.

TVA's nuclear program is managed by TVA's office of nuclear power (ONP). ONP's division of nuclear quality assurance (NQA) provides most of the quality assurance services for ONP. In the fall of 1987, NQA was managed at the corporate level by Nicholas C. Kazanas, then director of NQA, who reported directly to the manager of nuclear power. Hoyt C. Johnson was the Watts Bar site quality manager reporting directly to Mr. Kazanas. Mr. Johnson held the lead NQA position at Watts Bar. Watts Bar NQA was

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divided into a number of sections reporting directly to Mr. Johnson. Among others, these included the quality control section managed by Leonard Peterson and the quality engineering section managed by Johnfred Carlton. The quality control section was further

divided into seven units, each headed by a unit supervisor, and each representing a different discipline such as electrical, mechanical, and instrumentation and control. The unit supervisors did not report directly to Mr. Peterson. Instead, they reported to intermediate supervisors who were responsible for a group of two or more units. Complainant was a supervisor of the instrumentation quality control unit, and until January 19, 1988, his intermediate supervisor was Roy Anderson, who was the Electrical, Instrumentation, and Control (EIC) supervisor. Mr. Anderson reported to Mr. Peterson. Mr. Anderson retired in January 19, 1988; his position was not filled and thereafter complainant reported directly to Mr. Peterson.

The purpose of quality assurance at a nuclear plant is to protect the health and safety of the public and to verify compliance with the specifications for the plant and the regulations that govern. Nicholas Kazanas was the director and later became vice president of TVA's quality assurance and he was Mr. Johnson's direct supervisor. Admiral Stephen White, manager of nuclear power of TVA, was Mr. Kazanas' direct supervisor.

Mr. McCuiston's background and employment with TVA

Mr. McCuiston attended three years of college. He studied, among other subjects, business, drafting, math, and electrical circuits. While at TVA he completed courses in basic electrical and instrumentation; he had received specific instrumentation training and took courses which included electrical circuits and problems. (Tr McCuiston 4/24/89 p 106- 107).

Mr. McCuiston began his employment at TVA in April 1973 at Watts Bar steam plant as an engineering aide SE-3 level. In 1977, Mr. McCuiston began working with nuclear power at Watts Bar (WNP). His duties included measuring and testing equipment, sending it off for calibration, making sure due dates were correct and that the test equipment used in the field was properly identified. He was in charge of the drawings, and of auditing the measuring and test equipment. In 1978, Mr. McCuiston was promoted to an SE-4 in the division of

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construction and instrumentation engineering. This job entailed assisting the instrumentation engineers in installing instrumentation systems in the WNP. Instrumentation controls a nuclear power plant as a light switch controls our lights. (Tr. McCuiston 4124189 p. 32-35).

Mr. McCuiston was later promoted to an engineering associate at the SE-5 level in instrument engineering. He supervised two people and did hydrostatic testing, pneumatic testing, cleaning lines and installing instruments. He was then promoted to an engineering associate, SE-6. His duties were basically the same, however, he now was supervising 5 or 6 people. (Tr McCuiston 4/24/89 pgs 35, 37).

In May 1986 Mr. McCuistion was promoted to instrumentation/quality control unit supervisor, a management position (M-5), supervising 20 or more employees. He was responsible for making sure that employees under him were certified in the correct procedures and had the correct training. (Tr. McCuistion 4/24/89 pgs 45-46).

Mr. McCuistion's work performance at TVA had been evaluated by his supervisors periodically since the beginning of his employment. In every evaluation prior to the fall of 1987, he received high ratings (Exhibit C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8.) (Tr. McCuistion 4/24/89 p 36-40; 42-43; 47-48).

Two of Mr. McCuistion's most recent supervisors testified on Mr. McCuistion's behalf and elaborated on the reasons for evaluating him highly (Tr. Morton 4126189 p. 12-13, Mr. McCuistion's supervisor in 1984-1985; Tr. Burke 4125189 p 72-73, 84, Mr. McCuistion's supervisor May - September 1986). Mr. McCuistion's direct supervisor during 1987 to January 1988, Mr. Anderson, was ill and unable to attend the hearing.

During his employment with TVA Mr. McCuistion received several commendation letters and recognition for his outstanding work. (C-9, C11-C12 & C-13). Tr. McCuistion 4/24/89 p 49, 51, 52, 54, 86-87). He was also selected as the outstanding WNP employee for July 1981 and was in the top six in the selection of employee of the year. (Exhibit C-10; Tr. McCuistion 4/24/89 p 49, 51, 52, 54).

Protected Conduct Engaged In By Fred McCuistion

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A. Violation of the Stop Work Order (SWO) at WNP and the CAQR

Complainant alleges that his involvement with a Stop Work Order on September 2, 1987 was the reason for TVA having discriminated or retaliated against him. TVA responds that any limited involvement which complainant may have had with the Stop Work Order did not motivate TVA management to discriminate or retaliate against him and that none of TVA's actions in connection with the stop work order was discriminatory or in reprisal as to complainant.

On September 2, 1987, WNP was under several stop work orders. One of the stop work orders applying to the diesel generator building prohibited any work on gas and liquid filled sense lines that had no panel isolation valves. (Exhibit C-16). An isolation valve allows the valve to be turned off in the event there is a problem with the line. (Tr. McCuistion 4124189 p 59- 60).

Stop work orders are directives given to prevent work and avoid excess cost in situations where there may be problems with drawings or specifications. On January 12, 1987 Mr. Johnson, as Watts Bar Site Quality Manager, issued a stop work order with respect to certain work related to, among other things, instrumentation sensing lines. On

February 6, 1987, Mr. Johnson issued a partial release of the stop work order which allowed work to commence on "gas and liquid filled sense lines from the process connections to and including the panel isolation valve" (CX-16 McCuiston 4/24/89 Tr 59-60).

Because there was confusion in general about the interpretation of stop work orders and who could approve work addressed in them, Mr. Johnson directed, in a memorandum dated August 25, 1987, that the Quality Engineering Section Supervisor (Johnfred Carlton) would determine whether work was within the scope of the stop work order. The memorandum also gave Mr. Carlton the authority to authorize work that he determined was not prohibited by a stop work order (Johnson 4/27/89 Tr 78-80; Peterson 4/27/89 Tr 247-49 and 4/28/89 Tr at 98-100; RX 15).

A maintenance request dated August 10, 1987 was prepared for the repair of bent instrumentation tubing in the diesel generator building (RX-21, at 4). A notation on the request indicated that the work was approved by Ron Stamps in a telephone conversation on September 2, 1987. The note also indicated that

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the work "was not in instrumentation hold." Mr. Stamps was employed in the quality engineering section under Johnfred Carlton, and thus was one of the persons responsible for determining the scope of stop work orders and approving work not prohibited by a stop work order (McCuiston 4/24/89 Tr 62-63; Johnson 4/27/89 Tr 82-84).

Complainant was assigned to the power operation training center in Sequoyah nuclear plant during the month of September 1987, and he reported to work there rather than at Watts Bar. (McCuiston 4/24/89 Tr-57, 195-197; RX-24; RX-25). On the evening of September 2, 1987 complainant received a telephone call at his home requesting him to provide an instrumentation and control inspector to inspect the work being done at Watts Bar under the August 10 maintenance request. He was unable to provide an inspector and decided to go to this plant himself (McCuiston 4/24/89 Tr 57-58). Complainant reviewed the proposed work and decided that it was within the scope of the stop work order and not covered by the partial release because it involved the repair of instrument lines that did not have panel isolation valves.

Mr. McCuiston met with mechanical maintenance supervisor, Craig Williams, and others. Mr. Williams and the others present described the work that they wanted to do. Mr. McCuiston found there was no isolation valve and to replace the line would violate the stop work order. They told Mr. McCuiston that they had to replace the lines by 8:00 a.m. the next morning because Admiral Stephen White and chairman Charles "Chili" Dean were visiting WNP. (TR McCuiston 4/24/89 p 61).¹ Mr. Williams, Mr. McCuiston and the others present, then telephoned Mr. Hoyt Johnson, the Site Quality Assurance (QA) manager. The conversation ensued by way of a speaker phone. Mr. Williams identified all of the people in the room to Mr. Johnson at the beginning of the

conversation and identified Mr. McCuistion by both his first and last name. Mr. Johnson was told what they wanted to do for the visit by Admiral White and Chairman Dean. McCuistion told Mr. Johnson there was no isolation valve on the line and it would violate the stop work order to do the work. Mr. Johnson said to go ahead and do the work and for Mr. Williams and Yr. McCuistion to check it out the next morning (Tr McCuistion 4/24/89 p 62-63; McCuistion 6/6/89 p 165-167).

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Although Mr. Johnson admitted that he received a telephone call from Mr. Williams on September 2, 1987 concerning the stop work order at WNP, he denied knowing that he was speaking with Mr. McCuistion; instead, he said that he assumed he was speaking with Ted Willoughby, an inspector under Mr. McCuistion. He said that he found out later that it was Mr. McCuistion he was speaking with. (Tr Johnson 4/27/89 p 78-81). Mr. Johnson testified that he did not remember whether Mr. Williams told him that it was Ted Willoughby he was speaking with that night (Tr Johnson 4/27/89, p 178). Mr. Johnson testified that he did not bother to ask whether there was an isolation valve on the line during the conversation of September 2, and denied that Mr. McCuistion told him there was no isolation on the line (Tr Johnson 4/27/89 p 182). He admitted that in determining whether the stop work was violated, the question as to whether there was an isolation valve on the line was an important question. (Tr Johnson 4/27/89 p 181).

On September 3, 1987 Mr. McCuistion telephoned Ted Willoughby,² Roy Anderson,³ and Henry Huddleston.⁴ He told Mr. Willoughby and Mr. Huddleston to check the situation out. He explained that in his opinion the work on the line violated the Stop Work Order. He instructed Mr. Willoughby and Mr. Huddleston to write a Condition Adverse To Quality Report (CAQR) if there was a violation of the stop work order C-16). (Tr McCuistion 4/24/89 p 64; Willoughby 4/25/89 p 88).⁵ In the 10 month period preceding the approximate time of the stop work order incident, during which Mr. Peterson had been head of the quality control section, it issued 54 CAQR's (Peterson 4/27/89 Tr 251 and 4/28/89 Tr 101-102). In the 10 month period before Mr. Peterson became a supervisor, that section generated only two CAQR's (*id*). As of September 1987, there were approximately 950 CAQR's outstanding at Watts Bar; approximately 130 CAQR's were issued during that month (Peterson 4/27/89 Tr 252, 256). Mr. Willoughby, Mr. Huddleston and another inspector inspected the work on the line at WNP and found that it violated the stop work order and a CAQR needed to be written. Mr. McCuistion instructed Mr. willoughby to write the CAQR and Mr. Willoughby said he would. (Tr willoughby 4/25/89 p 89, Tr McCuistion 4/24/89 p 70). During this period of time, Mr. McCuistion was physically in attendance temporarily at the power operations training center (POTC) at

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Sequoyah Nuclear Power Plant). He had been assigned there to assist in developing a Training program for nuclear inspector and instrumentation. (Tr McCuiston 4/24/89 p 57). Mr. Willoughby and Mr. Huddleston were alternating supervisory duties under Mr. McCuiston in his temporary absence from the unit. (Tr Huddleston 4/26/89 p 188-189).

Mr. Willoughby told Mr. Peterson on or about September 3, 1987 that he was concerned that the Stop Work Order had been violated at WNP. He told Mr. Peterson a CAQR should be written. (Tr Peterson 4/27/89 p 249-250). On September 8, 1987, Mr. Huddleston told Mr. Peterson that Fred McCuiston had contacted them, explaining the situation and asked that they write a CAQR if they determined that the Stop Work Order had been violated. (Tr Willoughby 4/25/89 p 90, 111; Tr Willoughby 6/6/89 p 93-94). On September 11, 1987 Johnfred Carlton⁶ was instructed to write the CAQR (Tr Willoughby 4/25/89 p 90; Tr Willoughby 6/6/89 p 94; Tr Johnson 4/27/89 p 83). On September 14, 1987 Mr. Carlton and some other supervisors from engineering met with Mr. Willoughby. They tried to convince Mr. Willoughby that the CAQR should not be written. (Tr Willoughby 4/25/89 p 91).

Realizing that Mr. Carlton's group might not write the CAQR, several days later, Mr. Willoughby prepared a CAQR and presented it to Mr. Peterson for his required signature. Mr. Peterson refused to sign the CAQR. (Tr Willoughby 4/25/89 p 93- 94; 6/6/89 p 95). Mr. Tim Moore⁷ was present in Mr. Peterson's office during this encounter. Mr. Peterson also said 'my name is not going to go across Admiral White's desk twice in the same week. " (Tr Moore 4/25/89 p 147). Mr. Willoughby then reported the problem with the CAQR to the TVA Employee Concerns Program (ECP).⁸ (Tr Willoughby 4/25/89 p 95) No. 30. Mr. Peterson testified that Mr. Willoughby may have brought a draft CAQR; he did not know whether it was a CAQR because he did not look at the paper, so he was not sure. (Tr Peterson 4/27/89 p 258, 4/28/89 p 103-104). He admitted that he refused to sign the paper and stated that he could not swear that it was the CAQR (Tr Peterson 4/28/89 p 88-89).

On September 11, 1987 Mr. Johnson overheard Mr. Peterson and Mr. Carlton discussing the alleged violation, and he invited

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them into his office to explain the matter (Johnson 4/27/89 Tr 88-89, 93). The details of the meeting were described in testimony by both Mr. Johnson and Mr. Peterson (Johnson 1/27/89 Tr 88-93; Peterson 4/27/89 Tr 256-258). Mr. Peterson told Mr. Johnson that Mr. Willoughby believed there had been a violation of the Stop Work Order. Mr. Peterson explained the reasons for Mr. Willoughby's belief and stated that he agreed with Mr. Willoughby. Mr. Carlton argued that the Stop Work order had not been violated. Since Mr. Johnson's subordinates disagreed he had to resolve the issue himself. Mr. Johnson decided that Mr. Willoughby and Mr. Peterson were correct and Mr. Carlton was wrong. Accordingly, he determined that the Stop Work Order had been violated and that a CAQR should be written. (Johnson 4/27/89 Tr 90-91). Since Mr. Carlton's section was

responsible for determining whether or not work was within the scope of the Stop Work Order and had erroneously approved the work, Mr. Johnson assigned Mr. Carlton the task of writing the CAQR (Johnson 4/27/89 Tr 92). At the conclusion of the September 11 meeting, Mr. Johnson recorded in his planner that a CAQR would be issued because work has been done that was not covered by the partial release and that Johnfred Carlton would initiate the CAQR (Johnson 4/27/89 Tr 94-95; RX 39 at 1).

Numerous meetings concerning the violation of the Stop Work Order and drafting of the CAQR were held throughout the fall of 1987. The engineering and quality assurance group, assigned the task of writing the CAQR, did not agree that a violation had occurred. (Tr Willoughby 4/25/89 p 89-90; 6/6/89 p 93-94; Peterson 4/27/89 p 253-255, 261-262; and Moore 4/25/89 p 148-150, 195-196). The CAQR went through several revisions as to the corrective action required. (Exhibits C-18). Revision 1 of the CAQR, signed by Mr. Peterson on December 11, 1987, stated that there was no technical violation of the Stop Work Order. (Tr Peterson 4/28/89 p 95). Mr. Peterson signed the watered down version of disposition drafted by the engineers. (Tr Willoughby 4/25/89 p 97-107).

When Mr. Willoughby received the CAQR signed by Mr. Peterson, he called his supervisor, Mr. McCuiston, and a meeting was held on January 4, 1988. At that meeting Mr. Peterson finally agreed with Mr. McCuiston and Mr. Willoughby that the work had been a violation of the Stop Work Order and a CAQR was rewritten again. This final disposition was signed January 5, 1988 by engineering and January 6, 1988 by Mr. Peterson. (Tr

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Willoughby 4/25/89 p 108-109). The final disposition of the CAQR (Exhibit C-18) stated that the work performed on September 2, 1987 was a violation of the Stop Work Order at WNP and that the technical adequacy of the work would be reviewed under a previous CAQR. (Exhibit C-86). This previous CAQR involved the same line at the diesel generator building and was considered a significant CAQR. (Tr Willoughby 6/6/89 p 96-98).

Despite Mr. Peterson's having reminded Johnfred Carlton to write the CAQR, it still was not written in a timely manner. Several days later when Mr. Peterson was in Chattanooga on other business, he was called to the office of Nicholas Kazanas to talk about an anonymous letter to the then chairman of the TVA board of directors, Charles Dean, and a telephone call from Mr. Willoughby to Mr. White about the Stop Work Order incident (Peterson 4/27/89 Tr 260). Mr. Peterson explained to Mr. Kazanas that there was a valid CAQR, that is the Stop Work order had been violated and Mr. Carlton had been assigned to write it. (id). On October 1, 1987, Mr. Johnson stopped by Mr. Kazanas's office to explain the handling of the CAQR relating to the Stop Work Order incident (Johnson 4/27/89 Tr 97). Mr. Kazanas and Mr. Johnson felt that the failure to process the CAQR in a timely manner was itself a violation of the CAQR process and this required a second CAQR (id). They also determined that Mr. Johnson needed to have

a meeting with both Mr. Peterson's section and Mr. Carlton's section to discuss how they should work together to solve problems (Johnson 4/27/89 Tr 97-98). On October 2, 1987 Mr. Johnson met with the quality control and quality engineering section as he had discussed with Mr. Kazanas (Johnson 4/27/89 Tr 97-99; Peterson 4/27/89 Tr 261-262). The minutes of the meeting indicate that Leonard Peterson discussed the need for better team work and support, and Johnfred Carlton discussed ways to improve timeliness. (48). Mr. Johnson testified that Mr. Carlton was given the assignment to discuss timeliness because his organization's mishandling of the CAQR relating to the Stop Work Order showed that the quality engineering section needed improvement in this area (Johnson 4/27/89 Tr 99). Mr. Johnson also testified that he gave Mr. Carlton an oral reprimand for his unacceptable delay in handling of the CAQR (Johnson 4/27/89 Tr 184-185).

Mr. Peterson testified that on October 5, 1987 Hoyt Johnson directed him to perform the management review on the CAQR because Mr. Johnson had been unable to get the quality engineering

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section to do it. (Peterson 4/27/89 Tr 263). Mr. Johnson had a draft CAQR that the quality engineering section had started and he gave it to Mr. Peterson. Mr. Peterson called Mr. Willoughby into his office and gave him the draft CAQR and Mr. Willoughby expressed some problems with the language of the draft (*id*). Mr. Willoughby signed the CAQR as the initiator and returned it to Mr. Peterson. Mr. Peterson signed the CAQR as a management reviewer on October 5, 1987. (Peterson 4/27/89 Tr 263-264; 4/28/89 Tr 89; Willoughby 4/25/89 Tr 110; CX-18).

On November 3, 1987 the quality engineering section prepared revision 0 of a proposed disposition of a CAQR (CX-18, 4-51. Mr. Peterson was responsible for approving the proposed disposition because his organization had initiated the CAQR (Peterson 4/27/89 Tr 267-68). Mr. Peterson testified that he refused to sign revision 0 of the proposed disposition because he believed the quality engineering section was attempting in the language of the disposition to invalidate the CAQR by saying that the work performed was within the scope of the partial release and not in violation of the Stop Work Order. (*id*) at 268-70.

On December 11, 1987, the quality engineering section prepared revision 1 of a proposed disposition of the CAQR and Mr. Peterson signed it because he did not think it invalidated his CAQR (CX-18 at 6-9 Peterson 4/27/89 Tr 270). Mr. Willoughby did not agree with revision 1 and on January 4, 1988 he and complainant met with Mr. Peterson, Mr. Carlton and a representative of TVA division of nuclear engineering to discuss the matter. Mr. Willoughby testified that Mr. Peterson listened to the arguments that he and complainant presented and that Mr. Peterson then agreed to change the proposed disposition (Willoughby 4/25/89 Tr 109 to 10). Mr. Peterson approved revision 2 of the disposition on January 5, 1989. Mr. Peterson testified that revision 1 was adequate and that changes made by revision 2 "had no benefit" since they merely provided a cross-

reference to another CAQR and the corrective action was the same under both revisions. However, he agreed to revision 2 because Mr. Willoughby had a concern which they were able to address without requiring any additional work (Peterson 4/27/89 Tr-273-74). The final disposition of the CAQR (Exhibit C-18) stated that the work performed on September 2, 1987 was a violation of the Stop Work Order at WNP and that the technical adequacy of the work would be reviewed under a previous CAQR. (Exhibit C-86). This previous CAQR involved the same line at the diesel generator

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building and was considered a significant CAQR. (Willoughby Tr 6/6/89 p 96 to 98).

Since CAQR's are usually written the day after a CAQR has occurred, another CAQR (Exhibit C-19) was written that personnel had failed to generate a timely CAQR as required. (Willoughby 4/25/89 Tr p 112). when Mr. Willoughby received a copy of the CAQR on timeliness, he asked Fred McCuiston to set up a meeting with Hoyt Johnson. Mr. Willoughby was concerned since his name appeared as a generator of the original CAQR (C-18). Both Mr. Willoughby and Mr. McCuiston met with Mr. Johnson. Mr. Johnson initially agreed to change the original CAQR to reflect that Mr. Willoughby was not the responsible party for writing the CAQR. However, after he spoke with Mr. Peterson, Mr. Johnson refused to change it (Willoughby 4/25/89 Tr 113-115). After Mr. Johnson refused to change the original CAQR with Mr. Willoughby's name on it, Mr. Willoughby reported the problem to the nuclear regulatory commission (NRC).⁹ Mr. Willoughby was transferred to Sequoyah nuclear plant shortly after his inspection of the violation of the Stop Work Order on September 3, 1987 (Willoughby 4/25/89 Tr 118-119, 137-138). The Employee Concerns (ECP) final report found that the work on September 2, 1987 at WNP had violated the Stop Work Order (Willoughby 4/25/89 Tr 96; Tr Brantley 4/27/89 p 241, 242).

B. Mr. McCuiston's employees reporting problems to NRC

Mr. McCuiston's employees reported some significant problems to NRC in 1986. While his employees were on loan to Gary Tippen's group, during their inspections they found that a number of required clamps had been removed in the field. (McCuiston 4/25/89 Tr p 28). The inspectors reported the problem to Mr. Tippens, but he did not correct it. Mr. McCuiston inspected and realized that the problem needed to be corrected. A meeting was held with two NRC inspectors who ordered that the problem be corrected (McCuiston 6/6/89 Tr p 163-164). All the problems occurred with the work that was being performed under the supervision of Mr. Tippens, the inspector who found the problem showed up on the organizational chart as Mr. McCuiston's employee. (Johnson 4/27/89 Tr 70-71, 178-180). The problems to be corrected were a basis for a CAQR.

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Episodes occurring in 1987

A. Disciplinary Letter

On September 3, 1987, Mr. McCuistion talked with his supervisor, Roy Anderson about the CAQR for violation of the Stop Work Order at WNP. That same day, Mr. Anderson told Mr. McCuistion that Mr. Peterson was upset and was going to "run Mr. McCuistion off" because of the problems that his people were causing in writing the CAQR (Tr. McCuistion 4/24/89 p 73). Mr. Peterson instructed Mr. Anderson to give Mr. McCuistion a disciplinary letter for abusive annual leave. Mr. Anderson told Mr. Peterson that Mr. McCuistion had used less than anyone else and that the leave had all been approved. Mr. Peterson then changed and told Mr. Anderson to give Mr. McCuistion a disciplinary letter for creating a crisis. (Tr. McCuistion 4/24/89 p 74; Tr. Peterson 4/28/89 p 112; Tr. Jones 4/26/89 p 110-111; Exhibit - C-91). The disciplinary letter was dated September 4, 1987 but was received by Mr. McCuistion on October 5, 1987. (Exhibit C-20). At the time Mr. McCuistion received the letter, he did not know what the letter referred to. The disciplinary letter stated "your unit again discovered errors and inspections which were impossible to perform as the procedure was written. This type of performance and last minute grand standing by your unit will no longer be tolerated." (Tr. McCuistion 4/24/89 p 79-80). Prior to receiving the disciplinary letter Mr. McCuistion had no knowledge of any problem. He had received no warning that he had not done his job. (Tr. McCuistion 4/24/89 p 80). On October 5, 1987 Mr. McCuistion met with Mr. Anderson, Mr. Jim Moore and Mr. Peterson to discuss the letter that Mr. Anderson had written at Mr. Peterson's direction. Mr. McCuistion told Mr. Peterson that he thought he was being harassed because his employees had reported problems to the NRC and ECP. Mr. Peterson nodded his head (Tr. McCuistion 4/24/89 p 77). Mr. Peterson denied being aware of any involvement Mr. McCuistion had with the Stop Work Order, or the CAQR at the time of the October 5 meeting; however, Mr. Peterson met with Mr. Willoughby concerning this CAQR on that same day prior to his meeting with Mr. McCuistion. (Tr. Peterson 4/27/89 p 627; 4/28/89 p 110-111). Mr. Peterson admitted that at the meeting Mr. Anderson stated that he did not, feel a written warning was warranted. (Tr. Peterson 4/28/89 p 16).

Although Mr. Peterson testified that the meeting of October 5, 1987 served as notice that Mr. McCuistion's work was not up to standard, Mr. Moore who was present during the entire meeting

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testified that there was never any mention that the meeting was serving as notice that Mr. McCuistion's performance was not up to par. Mr. McCuistion never heard Mr. Peterson say that his performance was not up to standard. (Tr. McCuistion 6/6/89 p 162; Tr. Moore 6/6/89 p 104). Mr. McCuistion wrote a response to Mr. Anderson regarding the disciplinary letter. (Exhibit- C-21). (Tr. McCuistion 4/24/89 p 80-81).

Even though the disciplinary letter was not put into Mr. McCuistion's personal history record, it was reflected in his next management appraisal summary (MAS).¹⁰ Mr.

McCusition was never warned of any problems so that he could attempt to correct them prior to his MAS in the fall of 1987 (Tr McCuistion 6/6/89 p 162). Mr. McCuistion's MAS became a part of his personal history record. The MAS is also reviewed by managers evaluating candidates to fill positions at TVA. (Tr Peterson 4/28/89 p 113-114). On November 4, 1987 Mr. McCuistion told Mr. Johnson that he felt the disciplinary letter was for harassment purposes. (Tr McCuistion 4/25/87 p 14-15). It is TVA's position that Mr. Peterson had a legitimate non-discriminatory reason to issue a disciplinary letter; that it was not based on the stop work incident; and that in any event, the letter was withdrawn and replaced with an oral warning. The letter was dated September 4, 1987 (CX-20), and complainant did not know when he received it. (Tr McCuistion 4/24/87 p 73-76). Mr. Peterson testified that he considered complainant's use of annual leave during July and/or August 1987 to have been inappropriate, and accordingly asked Mr. Anderson to prepare the warning letter (Peterson 4/28/89 p 8-9; 13-14). Specifically, complainant was taking annual leave during the week and working for another section on weekends and this concerned Mr. Peterson because complainant's primary responsibility was to his own section (*id* at 13).

On September 1 and 2, before the stop work incident occurred, Ted Willoughby informed Mr. Peterson that it had been discovered that an inspection procedure was impossible to perform as written. The discovery was made during or immediately before an attempt was made to train inspectors to implement the procedure (*id* at 131). Mr. Willoughby told Mr. Peterson that when complainant's subordinates reviewed the procedure they did not review it for workability because they had not been instructed to do so. (Tr Peterson 4/28/89 p 10-11). Mr. Peterson decided that Mr. Willoughby and the other inspectors who had

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reviewed the procedure could not be held accountable for the failure since they had not been properly instructed (*id* at 10). In order to determine whether or not complainant should be disciplined for failing to instruct his inspectors to review the procedure for workability, Mr. Peterson asked Mr. Anderson to pull complainant's time sheets to see whether he was in charge of the unit at the time the procedure was reviewed (*id* at 11-12). Mr. Peterson testified that after examining the time sheets and the draft of the procedure showing when it had been reviewed, he and Mr. Anderson agreed that complainant was the responsible supervisor when the error was made (*id* at 11-12, 132-33, 135). Complainant's time sheets show that he was stationed at Watts Bar during August 1987 and at the power operation training center (POTC) near Sequoyah nuclear plant during September of that year (RX 24; RX 25; McCuistion 4/24/89 Tr at 57, 195-97, 199). They also show that complainant requested 20 hours of overtime during the month of August, among other things to work on procedures review (RX 25, at 2; Peterson 4/28/89 Tr at 15). On August 28, 1987 complainant sent a memorandum to Roy Anderson in which he indicated that he would be at POTC for the next four weeks and he informed Mr. Anderson as to who would be in charge of his unit while he was gone (RX 16; McCuistion 4124 tr at 202).

B. Panel Procedures

The training during which the deficient procedure review was discovered took place pursuant to a September 1 training memorandum which provided that the procedure was to be issued on September 3 (RX 26). The training was conducted and the deficiency discovered on September 1 or 2. Both Mr. Peterson and complainant testified that the procedure would have been reviewed prior to the issuance of the September 1 memorandum (Peterson 4/28 Tr 9-10) McCuistion 4/24 Tr 203). Complainant admitted that Mr. Peterson could fairly have assumed that complainant was responsible since he was at Watts Bar at the time (McCuistion 4/24 Tr 203).

After determining that complainant was at Watts Bar when his unit performed the deficient procedure review, Mr. Peterson reviewed the procedure himself and concluded that the quality control organization had not done its job (Peterson 4/28 Tr 12- 13). At that point, Mr. Peterson directed Mr. Anderson to add to the disciplinary memorandum about complainant's use of annual leave a second warning about his unit's failure to discover the

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deficiencies in the procedure (*id* 7-8, 13-14). However, Mr. Anderson stated that he had approved the leave, complainant had good reason for taking it, and it was inappropriate to warn complainant of the leave issue (*id* at 14). Accordingly mr. Peterson decided that no warning about use of annual leave should be included in the memorandum. (*id* at 15-16).

Complainant testified that he met with Mr. Peterson and discussed the letter in the presence of Mr. Anderson and Jimmy Moore (McCuistion 4/24 Tr at 76). He could not remember the date of the meeting but he thought it was in october 1987 (*id* at 76- 77). Mr. Peterson testified that the meeting occurred on October 5, 1987 which was confirmed in his daily planner (RX-37). Complainant testified that he prepared a response dated October 5, 1987 and gave it to Mr. Peterson. (McCuistion 4/24 Tr 80-81 CX-21). The response does not deny that the procedure was defective or that complainant was in charge when it was reviewed. Mr. Peterson testified that complainant did not deny in the meeting that he had been at Watts Bar when the deficient procedure review was performed, (Peterson 4/28/ Tr 183), although complainant said that he thought he was being singled out and harassed since other managers also made mistakes with procedure (*id* at 6).

After Mr. Anderson expressed his view that a written warning was not warranted for the problem with the procedures, Mr. Peterson decided that it should not be issued. (*id* at 16). Accordingly, Mr. Peterson wrote in his planner and stated in the meeting that the meeting itself would serve notice of his displeasure with the deficient review (*id* at 16, 112 to 13 RX 37). Mr. Peterson destroyed his copy of the memorandum, and it was not placed in complainant's personal history record or personnel file (*id*).

Complainant explains the panel procedures episode in the following terms:

Under the "controlling" section of Mr. McCuiston's MAS, it stated, "some procedures reviewed on short notice and worked on an overtime basis were later found to be deficient." (Exhibit 23; Tr McCuiston 4/24/89 p 192). This is a reference to the panel review procedure (R-28) which was also the subject of the disciplinary letter dated September 4, 1989 and received by Mr.

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McCuiston on October 5, 1987. (Tr Peterson 4/28/89 p 7-8). Lenny Peterson or Roy Anderson had asked that the instrumentation inspectors assist quality engineering in reviewing some procedures. Terry Huddleston, an inspector under Mr. McCuiston testified that Mr. McCuiston was not at WNP during the time this particular procedure was reviewed, that he was at the training at Sequoyah. Mr. Willoughby and Mr. Huddleston were in charge during the time Mr. McCuiston was at Sequoyah. (Tr Huddleston 4/26/89 p 183, 188-189, 203-204). Mr. Huddleston testified that Johnfred Carlton told the quality control inspectors that they were "not to be held accountable for the contents of these procedures." (Tr Huddleston 4/26/89 p 203). Fred McCuiston's inspectors were told by Johnfred Carlton to review the procedures to verify that all the "requirements of the engineering requirement specs were in there." (Tr Willoughby 4/25/89 p 134 see also Tr Huddleston 4/26/89 p 181-182; Tr Huddleston 6/6/89 p 116). The instrumentation unit felt they were being rushed and they were not technically capable of doing a good job. (Tr Huddleston 6/6/89 p 117). After the procedure was reviewed and approved to be revised, they discovered they could not do the inspection on the codings. (Tr Huddleston 4/26/89 p 184). The problem was found either on September 3, 1987 or in the days after. If the problem had been found prior to September 3, 1987, it could have been corrected. (Tr Huddleston 6/6/89 p 118). The problem was taken back to quality engineering, the unit responsible for making the revisions to the procedure. This was not anything unusual. The need for the revision did not hold up any work. This particular procedure has eight (8) revisions to it. (Tr Huddleston 4/26/89 p 184-186). Ted Willoughby went to Mr. Peterson and voiced a problem with the procedure. When Mr. Peterson asked Mr. Willoughby why he did not review the procedure for coding, he said that he was never instructed to do so. (Tr Peterson 4/28/89 p 10). Once the review had been performed and Mr. Peterson had signed the procedure, it was found to be deficient. (Tr Peterson 4/28/89 p 8). Many procedures were being reviewed during the summer of 1987. During a three month period around (30) procedures had been reviewed. (Tr Willoughby 4/25/89 p 120-121 Tr Peterson 4/28/89 p 134). It was not unusual for a procedure to undergo a revision. Sometimes there would be as many as (20) revisions. When a criteria changed or a problem was found with the procedure, it was revised. (Tr Willoughby 4/25/89 p 122; Tr Huddleston 4/26/89 p 187).

Mr. McCuiston testified he was not sure if he had reviewed

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this procedure, since several procedures had been reviewed. (Tr McCuiston 4/24/89 p 193). At the time the procedure was being reviewed Mr. McCuiston was at the POTC and sometimes came to WNP on Saturdays. Mr. McCuiston had been at Sequoyah nuclear plant for training earlier in the summer for about three weeks and several times during the summer for two to three days at a time. (Tr McCuiston 4/25/89 p 33, 80). On the front page of the quality control procedure on the local instrument panel inspection, Mr. Peterson's signature appears where Mr. McCuiston would have signed the procedure had he reviewed it. (Exhibit R- 28). As far as Mr. McCuiston could recall, he initialed every procedure he reviewed. (Tr McCuiston 4/25/89 p 35-36, 55; Tr Willoughby 4/25/89 p 123). Mr. Peterson had no documentation to show that it was Mr. McCuiston who reviewed the procedure. (Tr Peterson 4/28/89 p 133-134). Mr. Huddleston testified that he knew of no other supervisor who had been disciplined when there were problems with procedures (Tr Huddleston 6/6/89 p 119).

C. COMPLAINANT'S 1987 MANAGEMENT APPRAISAL SUMMARY (MAS)

Management takes the position as follows:

Complainant alleges that his 1987 MAS was discriminatorily lowered. TVA responds that a new procedure was applied that year which resulted in generally lower ratings in a non discriminatory basis for complainant and other nuclear power managers, and that complainant's management had good faith non-discriminatory justifications for his rating. The evidence does not support complainant's inference of discrimination.

TVA presents that in an October 2, 1987 memorandum, ONP manager Stephen White directed that the ratings given to nuclear power managers in the 1987 MAS process be distributed in accordance with a standard bell curve distribution (RX 14; Kazanas 4/28/89 Tr 234-357; Johnson 4/27/89 Tr 56-59; Peterson 4/28/89 Tr 26-27). Mr. White's directive required that 2% of the nuclear power managers be rated "unsatisfactory" on their MAS (RX 14, at 2). This was a new requirement for ONP, and it was imposed to make the performance evaluations more meaningful than in the past (Kazanas 4/28/89 Tr 234-37, 250-51; Johnson 4/27/89 Tr 57-59). ONP management believed that previous performance evaluations had not been meaningful. They were consistently skewed to the high side (few managers received low ratings and many were rated exceptional and superior) despite TVA's inability

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to operate any of its nuclear plants (*id*). In order to comply with the required standard distribution, Mr. Kazanas developed a uniform, multi-step procedure to be followed by all MQA managers. (Kazanas 4/28/89 Tr 237-52; Johnson 4/27/89 Tr at 54-68; Peterson 4/28/89 Tr at 20-34; RX 53). As the first step, each of the eight managers who directly reported to Mr. Kazanas (including, among others, Hoyt Johnson and the site quality

managers at TVA's other nuclear plants) were directed to evaluate each of their immediate subordinates (approximately 5 persons each) and meet with Mr. Kazanas in Chattanooga (Kazanas 4/28/89 Tr 237-42; Johnson 4/27/89 Tr at 54-57). The procedure required assigning numerical scores (from 1 to 5) to each of the nine performance categories on the manager's MAS forms, providing written justification for the score in each category, in adding the scores to arrive at a total score for each manager being rated (Kazanas 4/28/89 Tr 237-42; Johnson 4/27 Tr 53-56). The forms provided for 5 overall verbal ratings (*i.e.* "exceptional", "superior", "solid performer", "adequate", and "unsatisfactory", but no such ratings were to be established before the meeting with Mr. Kazanas (Kazanas 4/28 Tr 240, 243, 244).

Upon returning to Watts Bar from the meeting in Chattanooga, Mr. Johnson asked his own immediate subordinates including, Leonard Peterson to prepare numerical evaluations with written justifications for their subordinate managers and to bring this information to a meeting with him (Johnson 4/27 Tr 59- 64; Peterson 4/28 Tr 20-30). Mr. Johnson instructed his immediate subordinates not to assign overall verbal ratings at this preliminary stage of the appraisal process (Johnson 4/27 Tr 65-66; Peterson 4/28 Tr 25-30, 32-33, 73-74). To comply with the directions, Mr. Peterson asked his subordinates to evaluate the managers who reported to them (Peterson 4/28 Tr 22-23). Complainant's immediate supervisor, Roy Anderson, prepared a numerical evaluation and a hand written justification of the evaluation for complainant (*id* at 22-25; CX-22 at 2). The initial evaluation prepared by Mr. Anderson gave complainant a total numerical score of (30); this was lowered to (27.5) after a meeting between Mr. Peterson and Mr. Anderson in Mr. Anderson's office (*id*). Mr. Peterson testified that the numerical rating was lowered because the language that Mr. Anderson had provided in the written justifications for some of the categories did not support the numerical ratings that he had given (Peterson 4/28 Tr at 23-25). As an example, Mr. Peterson referred to the "problem

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solving/analysis" skilled category. Mr. Anderson had numerically rated complainant on the high end of the scale in that category but had written that complainant some times postponed resolutions until the last minute" (CX 22 at 2). Since Mr. Peterson considered those words descriptive of a "middle-rated" rather than a "high-end" he lowered the numerical rating from 4 to 3 on a scale of 1 to 5 (*id*).

TVA explains further: Mr. Peterson and his peers (Johnfred Carlton, Marty Johnson, J.P. Maulkey, Keith Warren, and Linda Smith) met with Mr. Anderson to evaluate the numerical ratings that had been developed (Johnson 4/27 Tr 59-64; Peterson 4/28 Tr- 25-30; RX 61, at 6-9). The composite numerical scores were narrowly bunched from the middle (starting at 26 or 27) to the high end of the scale. Accordingly, the group set those scores aside and undertook a "forced rank" of the Watts Bar NQA managers (*id*) similar to the process Mr. Kazanas had followed. This was accomplished by the groups debating and reaching a consensus as to who was the top performing manager at Watts Bar NQA, then the second, and so on, until a complete ranking of all Watts Bar NQA managers was

achieved (*id*). The group then compared the relative job performances of the managers being rated and reached a consensus as to the appropriate composite numerical score should be given to each. Throughout this process, overall verbal ratings were not used (Johnson 4/27 Tr -65; Peterson 4/28 Tr 25, 30; Kazanas 4/28 Tr 250-251; RX 61, at 7-8). Mr. Johnson testified that complainant was ranked near the bottom of the list at the beginning of the meeting and then throughout the meeting his relative ranking did not change (Johnson 4/27 Tr 62-63). Both Mr. Johnson and Mr. Peterson testified that the group agreed to the relative rankings (Johnson 4/27 Tr 64; Peterson 4/28 Tr 28-29). Miss Smith testified by deposition that the employees were "ranked fairly, in the sense I thought we did as best as humans can in an interactive process to decide how people rank" (RX 61, at 6). Mr. Johnson testified that there were no mention during the ranking meeting of complainant's involvement with the Stop Work Order or related CAQR (Johnson 4/27 Tr 64). Mr. Peterson testified that any involvement complainant may have had with the Stop Work order and related CAQR was not a factor in complainant's MAS rating (Peterson 4/28 TR 33-34). Thereafter Mr. Johnson ordered his subordinates to submit their written justifications to him for review to ensure that the language used in each category matched the numerical score given (Johnson 4/27 Tr 64-65). He testified that in those cases where the

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justifications and numbers did not match, the forms were sent back for further work (*id*). During this time, Mr. Peterson continued to work with Mr. Anderson and created a number of draft HAS forms for complainant (Peterson 4/28 Tr at 30-33; CX-22). These drafts were supposed to be confidential (Jones 4/26 Tr at 129), but complainant admitted that he surreptitiously took them from Mr. Anderson's desk and made copies (McCuistion 4/24 Tr 186- 188; CX 22). Mr. Peterson testified that certain changes were made in the language prepared by Mr. Anderson because it did not match the numerical ratings for some of the categories on the MAS form (Peterson 4/28 Tr 30-33). However, CX-22, at 2, the surreptitious copies) and CX-23 at 2, the final form show that Mr. Anderson's language was ultimately adopted in whole or in part in many critical areas including e.g. "planning and organizing" where Mr. Anderson wrote some "critical items were postponed to the last minute causing extensions or marginal responses" and "problem solving/analysis" where he wrote "some times postponed resolutions until the last minute." After Mr. Johnson was satisfied with the numerical scores and justification language on the MAS forms, he sent them together with a list of the employees showing the order of the ranking to Mr. Kazanas in Chattanooga for further review (Johnson 4/27 Tr 65-67 CX-90). No overall verbal rating had been assigned on the MAS forms as of this time (Kazanas 4/28 Tr 243-44). Mr. Kazanas testified that he wrote "excellent" after complainant's name on the list to indicate "the words substantiate the rating given" (Kazanas 4/28 Tr 245; CX 80). Mr. Kazanas sent the forms back to Mr. Johnson for further work, and they were re-submitted to Mr. Kazanas for the last time (still in terms of numerical score and written justification but without an overall rating) (Kazanas 4/28 Tr 246).

Mr. Kazanas took the MAS forms from all eight of his immediate subordinates and gave them to Rose Sexton, the NQA division personnel officer to perform the mechanical function of integrating the appraisals for the entire NQA division in drawing the lines necessary to establish the breaks for the bell curve distribution (Kazanas 4/28 Tr 248). Miss Sexton then separated the employees back into their individual organizations and drew lines to show Mr. Kazanas the breaks between the rating category for each group (*id*). Mr. Kazanas then met with his subordinates to discuss the breaks, some minor adjustments were made in situations where there was no distinct difference in performing between persons on different sides of the line, and the final

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breaks were established (*id* at 249-91 Johnson 4/27 Tr. 66-67). Mr. Johnson took these back to Watts Bar for use in putting the final rating on the MAS forms (Johnson 4/27 Tr 67). Complainant's rating as determined by the bell curve break points was "unsatisfactory" (*id*). When Mr. Peterson got this information from Mr. Johnson, he personally typed the rating on complainant's form in order to preserve confidentiality and gave it to Mr. Anderson for delivery to complainant (Peterson 4/28 Tr 33).

TVA maintains that complainant's low relative ranking was based on a number of factors identified by Mr. Peterson and Mr. Anderson. One involved an instance where two time extensions and reassignment of a project to another manager were required because complainant had failed to complete a response to the NRC on a licensing matter in a timely and adequate manner (*id* 41, 135 to 138). Others included a deficient procedure review in August 1987 (already discussed), Mr. Peterson's belief that complainant had escalated a decision by sending an employee to talk to him about a promotion rather than handling it himself, and complainant's general lack of willingness to seek compromise solutions through team work (*id* 36-39, 136-49). Complainant did not agree with the rating and on November 19, 1987 he wrote on the front of the MAS form that he did "not concur with this appraisal" (Peterson 4/28 Tr 34-CX-23). Although he discussed his disagreement with the overall rating several times with Mr. Peterson, he "never said that anything that was represented on his skills section of his MAS was false, at that time" (Peterson 4/28 Tr-34). Mr. Peterson developed an action plan to help complainant improve his performance (*id* 34-35). The plan involved specific performance objectives, training, and discussions both between Mr. Peterson and complainant and between complainant and Roy Anderson (*id* 34-42; C-X 37). Mr. Peterson discussed complainant's deficiencies with him on several occasions (Peterson 4/28 Tr 34-42). Mr. Peterson also scheduled complainant for time management and situational leadership training, which were performance objectives to overcome some of complainant's identified deficiencies, but he did not know whether or not complainant completed the courses because Mr. Peterson left Watts Bar in June 1988 (*id* at 38 to 39). On June 7, 1988, shortly before he left, Mr. Peterson prepared an interim performance appraisal pursuant to standard TVA procedure, rating complainant's job performance for the period October 1, 1987 to May 31, 1988. Mr. Peterson prepared the interim MAS form himself since at this time complainant was reporting directly to him.(

Peterson 4/28 Tr at 40). Although complainant had not been given his written performance objectives until about that time, Mr. Peterson rated complainant a "solid performer" on this appraisal (*id* 39-42 CX 79). He testified that he had paid "particular attention to complainant's deficient areas" and found "there was improvement in all of them" (*id* at 40-41). As specified examples of such improvement, Mr. Peterson pointed out that during the interim period complainant had "100% on time record" (in contrast to 1987 when "there was a problem with licensing issues being postponed until the last minute"), and his unit reviewed, trained and implemented a unit to lay out a program as scheduled while continuing to support the rest of the office in nuclear power" (in contrast to 1987 when "procedure reviews was a ... deficiency") (*id* 41). Respondent urges that the Court find no bases to infer that the lowering of complainant's 1987 MAS was in reprisal for his protected activity and finds that TVA had legitimate non discriminatory reasons for complainant's MAS rating.

The complainant's position is explained as follows:

Near the end of September 1987, the principal managers on Mr. Peterson's level under Mr. Johnson met for the purpose of ranking the 45 quality assurance managers under them. (Peterson 4/28/89 p 26). The system included assigning numerical values, 1 through 5, one being the lowest and 5 the highest (Johnson 4/27 p 55). At the ranking Mr. Peterson presented the ranking for Mr. McCuiston. He ranked Mr. McCuiston on the low end of the bottom. (Tr Johnson 4/27/89 P 172-173). None of the other principal managers made any other specific statement about Mr. McCuiston. The ranking was based upon Mr. Peterson's presentation. (TR Peterson 4/28/89 p 118). Mr. Johnson evaluated the managers directly under him and oversaw the process itself for all the appraisal and quality assurance at WNP (Tr Johnson 4/27/89 p 52-54). Mr. Johnson and Mr. Peterson previously told Miss Jones, the OIG investigator, that the group of principal managers were the persons that ranked and graded Mr. McCuiston. (Tr Tones 4/26/89 p 61). Mr. Johnson said that the group of principal managers, along with Mr. Peterson had presented the rating of Mr. McCuiston. (Tr Jones 4/26/89 p 48). Miss Jones then interviewed principal managers present at the ranking meeting, Linda Smith, Jimmy P. Mulkey, Johnfred Carlton, and Keith Warren and found that the information from Mr. Peterson and Mr. Johnson was not correct (TR Jones 4/26/89 p 61). After interviewing the principal managers, Miss Jones re-interviewed

Mr. Peterson (TR Jones 4/26/89 p 61). She wanted to give Mr. Peterson an opportunity to retract his prior statements since the information from the principal managers contradicted him. (Tr Jones 4/26/89 p 151-152, 157-158). These principal managers also informed Miss Jones that the assumption of the group as to rank individuals was that those at the bottom of the list were not unsatisfactory performers. (Tr Jones 4/26/89 p

61). After the ranking meeting Mr. Johnson sent the list of numerical rankings scores to Mr. Kazanas. Mr. Johnson met with Mr. Kazanas and discussed the numerical scores for the MAS's period. Mr. McCuiston's rating was unsatisfactory (Tr Johnson 4/27/89 p 67). Mr. Kazanas reviewed the MAS's of those people with check marks beside their name among these included Mr. McCuiston and Roy Anderson. Mr. Kazanas wrote "excellent job" beside Fred McCuiston's name. Mr. McCuiston is shown second from the bottom (Exhibit C-80). (Tr Kazanas 617189 p 61-62, 165). Mr. Kazanas testified that he had no personal knowledge of the work performance of Mr. McCuiston and relied upon information from. Mr. Johnson and Mr. Peterson. (Tr Kazanas 617189 p 3 to 4).

In mid September 1987, Mr. Anderson prepared an HAS evaluation evaluating Mr. McCuiston's performance for October 1, 1986 to September 30, 1987. (Exhibit C-52, Mr. Anderson's handwritten statement). He rated Mr. McCuiston on the upper end of solid performer. Mr. Anderson had told Mr. McCuiston throughout the year that he was a solid performer. Mr. Anderson had told Mr. McCuiston that unless he told him differently, Mr. McCuiston would be rated as a solid performer. (Exhibit C-91; Tr Jones 4/26/89 p 62 Tr McCuiston 4/24/89 p 82-84, 86 Exhibit C-22). Mr. Anderson's initial rating of Mr. McCuiston on planning and organizing was superior. He also rated Mr. McCuiston's superior in the category of supervision. His rating of Mr. McCuiston in the category of communicating was solid performer. (Exhibit C-22; Tr Jones 4/26/89 p 165-166 Tr Peterson 4/28/89 p 177). When Mr. Anderson presented Mr. McCuiston's MAS to Mr. Peterson for his review and signature, Mr. Peterson forced Mr. Anderson to change the HAS from solid performer to unsatisfactory. (Exhibit C-52, C-91). Mr. Peterson typed in "unsatisfactory" himself and demanded that Mr. Anderson sign the MAS. He also changed some of the wording in the narrative section (Tr Peterson 4/28/89 p 123-125, 127; Jones 4/26/89 p 167, 169 and 170). Mr. Peterson knew that Mr. Anderson felt Mr. McCuiston was a solid performer. (Tr Peterson 4/28/89 p 123- 125, 127).

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Mr. Peterson told Ms. Jones that Mr. Anderson had rated Hr. McCuiston on the low end of solid performer. However, when Miss Jones interviewed Mr. Anderson she found out he had rated Air. McCuiston on the upper end of solid performer. He also stated that when he received the information of solid performer from Mr. Anderson, he rated Mr. McCuiston as being adequate. (Tr Jones 4/26/89 p 62-63). Miss Jones found in interviewing Mr. Anderson that Mr. Peterson had rated Mr. McCuiston as unsatisfactory. (Exhibit C-91 C-52). Mr. Peterson's justification for giving Mr. McCuiston an unsatisfactory rating was "how easy people make it for us", meaning Anderson and Peterson. Mr. Peterson said Mr. McCuiston had not made it easy for him. Mr. Johnson had said in his office in a staff meeting that they were going to make MAS reviews measurable, such as for people that go to the NRC and ECP. Mr. Johnson further said that he had access to the numbers of people who go to NRC and ECP. (Exhibit C-91 Tr Jones 4/26/89 p 107 to 108). Mr. Johnson testified that managers are not necessarily rated based on the number of the employees who report concerns to the NRC or the ECP. They are

rated on how well they solve problems and whether the employees are going to NRC, ECP, the newspaper, television, or Mr. White or Mr. Kazanas or Mr. Johnson himself (Tr Johnson 4/27/89 p 77). Under direct examination Mr. Peterson used Exhibits C-22 stating that the numbers appearing on the right hand side of the second page C-22 were a combination of Mr. Anderson's and his. He also pointed out Mr. Anderson's writing and the changes that he himself made in the draft HAS and pointed out his own handwriting on the seventh page. (Tr Peterson 4/28/89 p 22-23; p 30-32). Under cross examination Mr. Peterson could not identify Exhibit C-22 definitely as the MAS that Mr. Anderson brought to him concerning Mr. McCuiston (Tr Peterson 4/28/89 p 121-123). After Mr. McCuiston knew his MAS rating but prior to actually receiving it, he told Mr. Johnson that he felt he was being harassed, that he did not deserve the unsatisfactory MAS, and that he should have been rated a solid performer. (Tr McCuiston 4/24/89 p 94-95). The unsatisfactory MAS went into Mr. McCuiston's personnel file. The MAS is used in determining whether a candidate is qualified to fill a vacant position. (Tr Peterson 4/28/89 p 125-126. Tr Johnson 4/27/89 p 148). An unsatisfactory MAS definitely is a detriment to other job opportunities. It would adversely impact the chances of getting a good job. (Tr Cochran 4/26/89 p 267).¹¹ The last column of complainant's Exhibit C-81 shows a bonus increase in pay. (Tr

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Johnson 4/27/89 p 167). Since Mr. McCuiston received an unsatisfactory HAS in the fall of 1987 he received no increase or portion of the pay for performance bonus. (Tr Johnson 4/27/89 p 168-169 Exhibit C-81). Mr. Anderson also received a lower rating by Mr. Peterson on his fall 1987 MAS. Mr. Anderson believed that his rating was lower (adequate) because Mr. Peterson felt that he, Anderson, was not "controlling Mr. McCuiston" (Exhibit C-52 Anderson handwritten statement). Mr. McCuiston actually signed the unsatisfactory MAS on November 19, 1987. After he had signed the MAS, he told Mr. Peterson he did not believe he deserved the unsatisfactory MAS (Tr McCuiston 4/24/89 p 89). After receipt of the MAS, Mr. McCuiston reported it to the NRC. (Tr McCuiston 4/24/89 p 88).

D. Investigation of Complainant's Complaint By Office of Inspector General

On October 24, 1987 Mr. McCuiston met with chairman Charles Dean¹² concerning the retaliation against him (Exhibit C-82) (Tr McCuiston 4/24/89 p 89 to 90). Mr. McCuiston's complaint was forwarded to the office of Inspector General from Mr. Dean's office (Tr Jones 4/26/89 p 47.¹³ (Tr Jones 4/26/89 p 41). The inspector general is appointed by the TVA board. The inspector general reports directly to the TVA Board of Directors and to Congress on a semi-annual basis. TVA's Inspector General's Office is an independent agency that is now statutory under the Inspector General's Office Act of 1978 (Tr Jones 4/26/89 p 80).

When a complaint is filed with the Inspector general's Office the following steps are taken: The complainant is interviewed and a list of witnesses obtained. The persons against whom the complaint is filed are informed of the complaint and given an opportunity to respond and to present any evidence or witnesses in support of their position. A personal history record of the individuals involved is examined. The witnesses are interviewed and any relevant records are examined. After the investigator prepares a report based upon the investigator's findings, the report is forwarded to the investigator's supervisor. He then reviews the report thoroughly and sends it to quality assurance. An individual in quality assurance checks to make sure the investigation is complete. The report of

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administrative inquiry is sent to the Assistant Inspector General in charge of investigations and then the report is forwarded to the Inspectors General's legal department. In Fred McCuiston case, the report had been forwarded to the Inspector General's legal department. (Tr Jones 4/26/89 p 44-46). Ms. Jones, the investigator, testified that the investigation was complete. (Tr Jones 4/26/89 p 67; Exhibit C-64). Mr. McCuiston also understood in June 1988 that the investigation was complete. (Tr McCuiston 4/24/89 p 93-94). Upon being assigned the investigation of Mr. McCuiston's complaint, Ms. Jones followed the steps described above. She gave Mr. Johnson and Mr. Peterson every opportunity to present additional information and to correct previous information given. (Tr Jones 4/26/89 p 48).

TVA objected to the investigator's unofficial opinions in the form of testimony and or summary and report, and maintains they were improperly admitted into evidence. TVA claims that aside from the objectionableness of her opinions of the facts, her opinions were based wholly on hearsay from declarants who in the main were available to and did testify. (TVA brief p 97). Ms. Jones believed that Hoyt Johnson contributed to the harassment of complainant and discouraged a free expression of different staff views in that he told Roy Anderson the ratings would be based on the number of concerns reported to the NRC, told Leonard Peterson that "people would be rated on" "how easy a manager makes our job"" told complainant that he would look for another job if he could not trust his upper management, and ordered a crew to perform certain work after complainant had refused to perform it on the ground that had violated a Stop Work Order (CX-64 1 to 2). She believed that Leonard Peterson harassed and intimidated complainant by causing his MAS rating to be lowered from solid performer to adequate (which the forced distribution caused to be further lowered to unsatisfactory, and that Mr. Peterson discouraged the expression of different staff views (CX-64 2-3). Ms. Jones further believed; (1) that Mr. Peterson assumed complainant was unable to deal with personnel problems because he mistakenly believed complainant had sent an employee who came to him with a question about employee opportunities; (2) that Mr. Peterson claimed complainant was unable to control Ted Willoughby because Mr. Willoughby had expressed his belief that he should be entitled to extra pay while acting as a supervisor in

complainants absence; (3) Mr. Peterson opposed the preparation of a CAQR by Ted Willoughby in connection with the Stop Work Order incident and was unhappy with

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complainant because he supported Mr. Willoughby; (4) that Mr. Peterson said complainant people were running to the NRC and ECP, and complainant had no control over them; and (5) Mr. Peterson wanted to give complainant a disciplinary letter for excessive use of leave, but when he found out that he could not do so, directed that a letter be issued for "creating a crisis" (*id*).

TVA takes the position that Ms. Jones's testimony was so inadequate that the factual bases expressed therein are unworthy of credence or weight, even assuming (contrary to the admissions by Ms. Jones) that her opinions had been issued as an official OIG report. TVA claims that Ms. Jones failed to discover or even inquire about many pertinent facts. TVA states that Ms. Jones admitted that her investigation failed to reveal that Mr. Anderson had criticized complainant for his delay of critical items to the last minute, deficient review of procedures, and postponement of problem resolution until the last minute, or that Mr. Anderson believed that complainant did not always enthusiastically support decisions and work toward the common goal (Jones 4/26/ TR 136-141 CX-22 at 2). Ms. Jones did not learn during her investigation that Mr. Peterson had evaluated complainant during a subsequent period and rated him a solid performer (Jones 4/26/ Tr 141) See CX-79). TVA claims and concludes that the bases of Ms. Jones opinion are simply undercut by the record. (TVA brief page 70).

Continuing Retaliation Against Mr. McCuiston in Winter and Spring 1988.

The complainant takes the position that there was a continuing retaliation against him by management in the winter and spring of 1988. After receiving the unsatisfactory MAS, Mr. McCuiston attempted to transfer to other positions within TVA. He applied for an M-5 position in technical services and for an M-5 position with the Office of Inspector General. He received no response (Tr McCuiston 4/24/89 p 96). In January 1988 Mr. Roy Anderson took early retirement from TVA because he could no longer put up with the harassment and intimidation. (Exhibit C- 52, Anderson handwritten statement). In February 1988 Mr. Johnson met with Mr. McCuiston. During that meeting Mr. Johnson suggested that Mr. McCuiston maybe should seek employment outside TVA. (Tr McCuiston 4/24/89 p 140-142; Tr Johnson 4/27/89 p 109-110). Mr. Peterson recommended the elimination of the management level which included Mr. McCuiston's position in

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the spring of 1988 (Tr Peterson 4/28/89 p 179-180).

Reduction In Force (RIF)

During the summer of 1988, TVA went through a reduction in force (RIF). (Tr Sexton 4/27/89 p 211-214). The reorganization chart showing what the quality assurance organization at WNP would look like after the RIF was prepared by Mr. Johnson and approved by Mr. Kazanas. The reorganization chart showed the elimination of the layer of management positions which included Mr. McCuiston's position. (Tr Kazanas 6/17/89 p 13-14, Tr Johnson 4/27/89 p 34-36; Exhibit R-10). Once the positions to be eliminated were targeted and competitive areas and levels defined, the retention register was drawn up. The retention register ranked employees and showed which would be riffed. (Tr Sexton 4/27/89 p 211-215 Exhibit C-76). The retention register showed the termination dates of Mr. McCuiston and other M-5 employees under Mr. Peterson in the QC division at WNP. (Tr McCuiston 4/24/89 p 96-98). In the RIF the electrical and instrumentation positions were combined, the welding position, eliminated, civil position retained, mechanical position retained, and hanger and mechanical positions combined. (Tr Johnson 4/27/89 p 124). The other people listed in the retention register who are still with TVA are Jackie Morton, Milford Terry, Kenny Hyde, and Joe Lisa. Bert Hammer also listed on the retention register resigned from TVA (Tr McCuiston 4/24/89 p 97-98). Mr. Peterson testified that he was not familiar with the retention register and was not qualified to answer whether the retention register showed the positions to be affected by the RIF. (Tr Peterson 4/28/89 p 154). Mr. McCuiston received a reduction in force letter and was terminated from TVA effective August 25, 1988 (Tr McCuiston 4/24/89 p 104-105 Exhibit C-38). Mr. McCuiston was the only manager under Mr. Peterson who went home as a result of the RIF. (Tr Peterson 4/28/89 p 157, 180).

Others Got Jobs

Complainant takes the position that all people on the same level of management as Mr. McCuiston NQC at WNP got other positions within TVA in quality assurance or outside of quality assurance. The only two people on this management level who are no longer with TVA are Fred McCuiston and Bert Hammer. (Tr Johnson 4/27/89 p 116-120). All the managers listed in the memorandum dated July 1, 1988 (R-10), to be potentially impacted

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by the RIF, are still at TVA with the exception of Bob Forston, Fred McCuiston and Bert Hammer. Mr. Johnson did not know whether Bob Forston had another job but he was not involuntarily riffed. Mr. Johnson thought that Mr. Hammer was offered a shift coordinator job at TVA and accepted the job but shortly thereafter left TVA. (Tr Johnson 4/27/89 p 119, 139 to 141; Tr Nixon 6/6/89 p 76-77). Mr. Johnson testified that generally applications had to be made for positions within quality assurance using a standard TVA application form (Tr Johnson 4/27/89 p 147-148). However, he did not know whether Mr. Jacky Morton had applied for the job he was offered the day the RIF was effected. (Tr Johnson 4/27/89 p 117). Mr. Jacky Morton testified that he received a RIF notice. On the

day before he was to leave TVA, Mr. Johnson asked him to come to his office to interview for a job. Mr. Morton had not applied for the job. The next day while he was processing out, he was asked to back track and was told he had gotten the job in quality surveillance. Mr. Morton had no previous experience in a surveillance position. (Tr Morton 4/26/89 p 23-25). Mr. Ed Burke testified that he had gone from one position to another without having applied for the new position (Tr Burke 4/25/89 p 79). When referring to the retention register (Exhibit C-76), Mr. Milford Terry stated that his name appeared on the register with a termination effective date of August 25, 1988, however, he never received a RIF notice. (Tr Terry 4/26/89 p 218). Mr. Johnson decided after the retention register was prepared but prior to the sending of RIF notices, that Milford Terry's position would be not eliminated (Tr Sexton 4/27/89 p 228). A lot of people took jobs outside of quality assurance but still within TVA. The people got jobs within TVA in any way they could by whatever means were available for whatever positions were available whether formally applying for them or transfers or giving their resumes to those in charge (Tr Johnson 4/27/89 p 146-147). Mr. Peterson testified that he did not know whether there were jobs people filled at TVA the summer of 1988 for which people did not apply but there may have been (Tr Peterson 4/28/89 p 165).

Mr. Paul Cochran and Mr. McCuiston both came to Knoxville to the TVA job fair in the summer of 1988 (Tr Cochran 4/26/89 p 264-265). Mr. McCuiston was not offered any job with TVA; was not offered any way to stay at TVA, even though all the others on the retention register, with the exception of Bert Hammer who chose to leave, remained at TVA in some capacity (Tr McCuiston 4/25/89 p 23-25). Mr. Huddleston testified that Mr. McCuiston

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lost his job because he would not consent to doing things that were not according to procedure. The CAQR condition in the diesel generator building was one example of it. (Tr Huddleston 6/6/89 p 130-131).

Electrical, Instrumentation and Control Position

In quality control at WNP bar in the summer of 1988 there were three positions available: (1) supervisor of the E, I and C section, and (2) quality control shift coordinators. (Tr Nixon 6/6/89 p 17). Around June 20, 1988 Mr. Don Nixon¹⁴ was loaned to Watts Bar as acting manager of quality control, temporarily filling in for Mr. Peterson who was on loan to Browns Ferry Nuclear Plant. (Tr Nixon 6/6/89 p 9). Mr. Peterson was expected to come back to Watts Bar into the position of quality control supervisor. (Tr Nixon 6/6/89 p 37). Mr. Peterson had some interest in filling the positions at WNP and who would be working under him when he returned to WNP. Mr. Peterson provided some input and some assistance to Mr. Nixon concerning filling all the positions of people who would be working under him when he returned to Watts Bar. (Tr Peterson 4/28/89 p 159-160).

Exhibit R-10 is the memorandum listing M schedule employees potentially impacted by the RIF and the chart which reflects the organization after the reduction in force. Mr. Hitson was not on the list because he was not at a management level. (Tr Johnson 4/17/89 p 137-138). The Articles of Agreement (Exhibit C-57) outlined the reduction in force for union employees. Robert Hitson, as a union employee should have returned to that position, should not have been put in the position as acting supervisor of electrical instrumentation and control (E, INC). because Mr. Hitson was not management level (Tr McCuistion 4/24/89 p 111-112). Mr. McCuistion formally applied for the E, I and C position the first day it was advertised. He completed and sent in his application along with his resume (Exhibit C-78) to Chattanooga. (Tr McCuistion 4/24/89 p 105 R-33, job announcement for position). Mr. Nixon received from personnel a package consisting of the vacancy announcement, the application form from the employees and the other attachments showing their credentials, a computer print out giving a listing of the applicants in time and grade in years of service, and other information. Mr. Nixon then used a spread sheet listing all the applicants and their experience and qualifications. (Tr Nixon

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6/6/89 p 20-21 Exhibit C-30). Mr. Nixon was sure that he would have been aware that Mr. McCuistion had courses in electrical circuits at the time he was looking for a candidate to fill the position over E, I and C in the summer of 1988 if it was in Mr. McCuistion's personnel package. Mr. Nixon was also sure that he would have been aware that Mr. McCuistion had worked in digital loops at Watts Bar if it was in his package. He had no memory of any of this on the day of the hearing, however, Mr. Nixon admitted the digital loop work was a combination of electrical and instrumentation and instrumentation also includes some electrical work (Tr Nixon 6/6/89 p 65-66). Mr. Nixon then stated he did not consider Mr. McCuistion to be qualified for the supervisor of E, I and C job because he needed some one with both electrical and instrumentation background. (Tr Nixon 6/6/89 p 25).

In Mr. Nixon's opinion it is important for first line supervisor to have the technical knowledge within his discipline (Tr Nixon 6/6/89 p 13-14). Mr. Nixon has never been a first line supervisor in instrumentation or in electrical. (Tr Nixon 6/6/89 p 46). In answer to the question as to whether there have been other first hand supervisors who have not had technical experience in the positions they were supervising, Mr. Nixon went into an explanation of the reorganization in TVA concerning the levels of inspectors. He then admitted there may have been supervisors who had no technical experience in the positions they were supervising. He admitted that Milford Terry had supervised hangers several months prior to Mr. Nixon coming to Watts Bar, but stated he did not know whether Mr. Terry had technical experience in hangers (Tr Nixon 6/6/89 p 66-68). Mr. Terry did not have such experience. (Tr Terry 4/26/89 p 212). Mr. Nixon testified that Jacky Morton had been a first hand supervisor over x-ray but testified that he did not know whether Mr. Morton had technical experience in x-ray. (Tr Nixon 6/6/89 p 69). Jacky Morton went from a management position in mechanical quality control in having

responsibility in instrumentation quality control. Mr. Morton did not have any hands on experience in instrumentation but yet was supervising instrumentation inspection. Mr. Morton was asked if he would assume the responsibility. (Tr Morton 4/26/89 p 10-11, 19-20). TVA has been cross-training inspectors and some of the managers to have them cross-certified in other disciplines. Electrical inspectors have been trained in instrumentation and there will be a lot of walk down in instrumentation. Mr. Hitson does not have

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instrumentation experience. At the date of the hearing he had not had training in instrumentation and was not certified in instrumentation (Tr Johnson 4/27/89 p 130-131).

Mr. Nixon recalled reviewing the field files for Mr. McCuiston when he reviewed the packages on the applicants for the E, I and C job. The field file included Mr. McCuiston's HAS, and the positions that he had held in TVA. Mr. McCuiston met the education equivalent for the job. (Tr Nixon 6/6/89 p 84- 85). The spread sheet lists beside Mr. McCuiston's name that he had an unsatisfactory MAS for 1987 and lacked sufficient electrical experience. The spread sheet also showed that Mr. McCuiston had nine years nuclear experience and two years as quality control supervisor. (Tr Nixon 6/6/89 p 26 Tr Peterson 4/28/89 p 125 Exhibit R-30). Mr. Johnson reviewed the spread sheet and approved the people that Mr. Nixon recommended to be offered the E, I and C job. This did not include Mr. McCuiston. Mr. Nixon was sure that Mr. Peterson knew that Mr. McCuiston was among the applicants. (Tr Nixon 6/6/89 p 63-64). When the two applicants offered the position did not accept the offer, Mr. Nixon re-advertised for that position in the fall of 1988. Mr. McCuiston was not notified that the position was being re- advertised. (Tr Nixon 6/6/89 p 60-61). Mr. Nixon prepared a second spread sheet for the E, I and C supervisor job. Mr. Nixon felt that it was important enough to fill the E, I and C position to re-advertise it.

Mr. McCuiston was not on the second spread sheet for the candidates considered in the fall of 1988 (Exhibit R-55; TR Nixon 6/6/89 p 33-34, 62, 64). Mr. McCuiston never heard anything from his job application (Tr McCuiston 4/24/89 p 107- 108). Mr. McCuiston had previously done electrical inspections on lever switch settings and had also had the basic electrical courses at POTC. He had approximately 11 years of instrumentation experience (Tr McCuiston 4/24/89 p 109). mr. McCuiston felt that the unsatisfactory rating he received was the main reason he did not get the E, I and C position. (Tr McCuiston 4/24/89 p 109-110).

The position of E, I and C supervisor was not filled as of the date of the hearing in this Court (Tr Johnson 4/27/89 p 38, 4). Mr. Hitson applied for the E, I and C supervisor position but the position was not offered to him because he was not considered to be qualified. (Tr Johnson 4/27/89 p 51). At the

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time of the hearing, Mr. Hitson has been the acting supervisor of the E, I and C unit since September 1988. Mr. Hitson did not have any experience in instrumentation when he became acting supervisor of E, I and C (Tr Nixon 6/6/89 p 64). Mr. Hitson did not meet the educational equivalent for the job of E, I and C supervisor (Tr Nixon 6/6/89 p 85). At the time of the RIF, Mr. Nixon was aware that Robin Hitson was only a temporary M-4. He was not on the management level permanently as coordinator. He was on the list to be riffed at his SE level. Instead of being riffed, he was selected to fill a position at management level, that of shift coordinator. (Tr Nixon 6/6/89 p 75-76). The organization chart for quality control as of June 2, 1988 showed Mr. McCuistion as a temporary M-4. Due to an earlier reorganization, Mr. McCuistion, along with other individuals was dropped back one grade. On the organizational chart, several permanent M-5's were shown as temporary employees. During the reduction in force anyone in a temporary or acting position during the RIF goes back to their permanent position for purposes of the retention roster. In other words, Mr. McCuistion should have returned to an M-5 and Mr. Hitson a temporary M-4, who was permanently on the SE schedule which is not a management level schedule 4 position, should have returned to an SE-5 for purposes of the reduction in force. Mr. Hitson should have been placed on the retention roster with other SE-5 inspectors for the purpose of determining whether or not he would be retained at the time of the RIF. Mr. Hitson now holds an M-4 position of shift coordinator and is acting supervisor over electrical, instrumentation and control, the position Mr. McCuistion applied for in the summer of 1988. (Tr McCuistion 4/24/89 p 101-104; Tr Johnson 4/27/89 p 113). According to Mr. Huddleston, an inspector under Mr. Hitson, Mr. Hitson is a very poor supervisor and lacks knowledge in instrumentation. In Mr. Huddleston's opinion, Mr. McCuistion was qualified to be the E, I and C supervisor. (Tr Huddleston 4/26/89 p 189-191).

Mr. Nixon testified that Mr. McCuistion would have been qualified for the shift coordinator job that Robert Hitson has now. (Tr Nixon 6/6/89 p 71). If Mr. Peterson had stayed at Watts Bar instead of going on to Browns Ferry, he would have prepared the spread sheet and been in charge of filling the position of E, I and C supervisor. (Tr Nixon 6/6/89 p 74). Mr. Johnson mentioned to Mr. Nixon that Mr. McCuistion had applied for the instrumentation, E, I and C supervisor position (Tr Johnson 4/27/89 p 52). Mr. Peterson did not know what factors Mr. Nixon

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considered in choosing the top candidates for the three jobs: E, I and C and the two shift coordinators. (Tr Peterson 4/28/89 p 163). He did know that Mr. Nixon considered the factors of education, background, experience, but did not remember any other factors considered. (Tr Peterson 4/28/89 p 164). Mr. Peterson talked with Mr. Nixon about the filling of the position when it got down to the final list, including the position of E, I and C. (Tr Peterson 4/28/89 p 161-162). When Mr. Nixon discussed the top candidates for the three positions with Mr. Peterson, Mr. Peterson asked him about Mr. McCuistion and

whether Mr. McCuistion had applied for the E, I and C supervisor job. He also asked him about his other managers. He did not tell Mr. Nixon that Mr. McCuistion should be considered as one of the top candidates for the E, I and C job. (Tr Peterson 4/28/89 p 56, 164). Mr. Nixon told Mr. Peterson that Mr. McCuistion was not on the final list. (Tr Peterson 4/28/89 p 57).

TVA's position as to non-selection of complainant for the E, I and C supervisor position.

Complainant alleges that his failure to be selected for an E, I and C supervisor position was discriminatory. It is TVA's position that complainant's lack of the necessary electrical experience was a legitimate non-discriminatory reason for not selecting him for the job and that there is no basis for an inference of discrimination. In the new organization, the E, I and C supervisor reported directly to the quality control section supervisor and was the first line supervisor for both, electrical inspection and instrumentation and control inspection (RX-10 at 2; RX-33 Peterson 4/28/89 Tr 50). Mr. Nixon considered it important for such first line managers to have a strong technical knowledge of their respective discipline so that they could answer their inspector's technical questions. He considered such knowledge to be especially important in the new organization because the former non-management positions of lead inspector had been abolished, leaving no senior level employee to assist the first line managers in supervising their inspectors. (Tr Nixon 6/6/89 p 15 to 15, 66-67, 70-81 to 82).

At the time Mr. Nixon was attempting to select an E, I and C supervisor, it was anticipated that the work at Watts Bar was going to require much more electrical inspection than instrumentation and control inspection. Mr. Nixon testified that based upon the specific number of inspections that would have to

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be performed in the two disciplinary areas, the manpower projections he prepared during the summer of 1988 for fiscal year 1989 called for seven electrical inspectors and three instrumentation and control inspectors (*id* 10-12). Similarly, Mr. Johnson testified that he was looking for an E, I and C supervisor with "heavy hands-on experience in the electrical area" because "the bulk of the work was in an electrical area" (Tr Johnson 4/27/89 p 43-44). Mr. Peterson testified that the bulk of the planned inspections were electrical, and as of the time of hearing Watts Bar NQA was about to embark on an electrical inspection program requiring enough electrical inspectors to work three shifts seven days a week, without any individual inspector working over time. (Tr Peterson 4/28/89 p 57-62). Testifying for complainant, Jimmy Moore, a training coordinator, speculated that electrical work must have been lax as of the time of the hearing because all of the electrical inspectors had been placed in training to qualify to do instrumentation and control inspections. (Tr Moore 4/25/89 p 182-183). However, Mr. Peterson explained that in order to increase efficiency and be better prepared for handling the inspection needs, once Watts Bar became an operating nuclear plant, TVA began a policy of cross-

training its inspectors so that they would be qualified in more than one inspection discipline. (Tr Peterson 4/28/89 p 57-60). He testified that as of the time of the hearing, the former instrumentation and control inspectors had already received training in electrical inspections, and they were handling the electrical inspections while the electrical inspectors were engaged in instrumentation and control training (*id*).

The advertising for the E, I and C supervisor position directed all applicants to send applications and personal resume to Rose Sexton, the division personnel officer (RX -33). Complainant and 23 others applied for the job, and all of the applications and resumes were forwarded to Mr. Nixon. (Tr Nixon 6/6/89 p 20-21 RX-30). Mr. Nixon reviewed these materials and prepared a work sheet listing the applicants together with the education experience and other pertinent information. Mr. Nixon noted on the work sheet that all of complainant's nuclear experience was in instrumentation, that he lacked sufficient electrical experience, and that he had received an unsatisfactory performance rating for 1987 (RX-30 at 2). Mr. Nixon testified that he was looking for an individual with experience in both the electrical and instrumentation areas, but he placed primary

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emphasis on the electrical experience because most of the work was going to be electrical. (Tr Nixon 6/6/89 p 21-22). The materials complainant's submitted with his application did not demonstrate sufficient electrical experience, so he was not selected. (*id* at 25-27 65-66 80-81). Mr. Nixon testified that if complainant had had the experience necessary for the job, he would have taken the unsatisfactory 1987 performance rating into account in making his selection; since complainant did not have such experience, his performance rating was not a factor in Mr. Nixon's decision not to select him. (*id* at 26-27, 48 to 49).

Mr. Nixon found three individuals among the 24 applicants who appeared to be well qualified for the E, I and C supervisor position: Michael Richardson, Mike Miller and John Pantanizopoulos (*id* at 23). He selected Mr. Richardson as his first choice and Mr. Miller as an alternate. Mr. Richardson and Mr. Miller had extensive backgrounds in both the electrical and the instrumentation areas. Mr. Richardson had completed the apprentice program as an electrician, served as an assistant electrical superintendent, and supervised electrical and instrumentation quality section; Mr. Miller at the time of the consideration of the E, I and C supervisor position, was serving in that very capacity at Sequoyah nuclear plant. (*id* at 30-32) Tr Johnson 4/27/89 p 43-44 RX-30, at 6). Mr. Pantanizopoulos who had bachelor's and master's degree in electrical engineering and was working in the quality engineering section under Johnfred Carlton appeared to be highly qualified, but Mr. Nixon decided not to select him after learning from Mr. Johnson and others who had supervised him that he lacked good management skills. (Tr Nixon 6/6/89 p 23-25, 29-30 Johnson 4/27/89 p 47-48, RX-30 at 1). Specifically Mr. Johnson had informed Mr. Nixon that Mr. Pantanizopoulos has management problems with respect to timeliness in that he had been assigned to prepare a CAQR and had not done so in a timely manner. (Tr Nixon 6/6/89 Tr 24-25). Mr. Johnson agreed with Mr. Nixon's choices and on August 12, 1988

sent a memorandum requesting that the job be offered first to Mr. Richardson and then to Mr. Miller. The memorandum contained a comparison data sheet prepared by Mr. Nixon that detailed the extensive background and qualifications of both candidates (RX-49 at 3). NQA division policy required that the selection be reviewed and approved by a Management Review Board consisting of several senior NQA managers before the position could be offered to Mr. Richardson or Mr. Miller. (Tr Johnson 4/27/89 p 45-48 Tr Nixon 6/6/89 p 28-30). The MRB reviewed the entire "selection

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package" containing the data pertaining to all 24 candidates and questioned Mr. Johnson and Mr. Nixon as to why Mr. Pantanizopoulos had not been recommended for selection since his credentials were so strong. Mr. Nixon and Mr. Johnson explained the candidate's management problems to the MRB, and the selection was approved. The MRB did not inquire as to why complainant was not offered the position (Tr Johnson 4/27/89 p 48).

Mr. Richardson and Mr. Miller both declined to accept the position (Tr Johnson 4/27/89 p 48 Nixon 6/6/89 p 32). Mr. Johnson and Mr. Nixon did not believe that any of the remaining candidates from the first advertisement met the needs of the position although there was a good possibility, in view of the large RIF at TVA, that some new candidates would be interested in the position. They thus decided to advertise the position a second time (Tr Johnson 4/27/89 p 48-49, Nixon 6/6/89 p 32 -35). Mr. Nixon prepared a second spread sheet containing the applications received after the second advertisement (RX-55) and began to interview candidates (Tr Nixon 6/6/89 p 33-,35). In the middle of these discussions Mr. Nixon left Watts Bar for a new position in TVA's Chattanooga office on December 12, 1988 (*id.*)

In Mid January 1989 Mr. Peterson returned to Watts Bar after seven months at Browns Ferry and resumed the duties that Mr. Nixon had performed in his absence (Tr Peterson 4/28/89 42- 43). While at Browns Ferry, Mr. Peterson had little input into Mr. Nixon's decisions about filling the E, I and C supervisor position. Mr. Nixon testified that he did not discuss the candidates with Mr. Peterson, until he had already decided to select Mr. Richardson and Mr. Miller. Mr. Peterson had previously said that he trusted Mr. Nixon's judgment about the selection and that Mr. Nixon should take care of it. (Tr Nixon 6/6/89 p 46-48). When Mr. Nixon called to discuss the short list, Mr. Peterson asked him about complainant. Mr. Peterson had advised complainant to apply for the job and was concerned about all of his subordinate managers at Watts Bar that were subject to the RIF. Mr. Nixon told him complainant was not on the short list (*id.*).

Charles R. Hitson, former supervisor of the electrical inspection unit (CX-43 at 5) was asked to assume the duties of the E, I and C supervisor position along with those of his new position as a shift coordinator. He was not offered the position, despite having applied for it on both advertisements,

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because he did not have instrumentation experience and was not considered to be qualified for the job (Tr Nixon 6/6/89 p 25-26, 34-35, 64-65; Johnson 4/27/89 p 50-51; Peterson 4/28/89 p 60). Mr. Johnson testified that as of the time of the hearing Mr. Hitson was able to handle these responsibilities because there had not been a whole lot of work in the electrical and instrumentation and control area. (Tr Johnson 4/27/89 p 51). Complainant admitted that when he left TVA, there was little instrumentation and control inspection being performed (Tr McCuiston 4/24/89 p 234-36).

Complainant's Position- TVA's Stated Rationale For Rating Mr. McCuiston as Unsatisfactory is not credible; all reasons offered by TVA are pretextual

The complainant's position on this issue is explained as follows:

A. Problem Solving

Mr. Peterson testified that he rated Mr. McCuiston unsatisfactory because of poor job performance in the following areas: problem solving/analysis (Tr Peterson 4/28/89 p 143), planning and organizing (Tr Peterson 4/28/89 p 136) and controlling (Tr Peterson 4/28/89 p 130).

Under the section Problem Solving/Analysis on Mr. McCuiston's unsatisfactory MAS, it stated, "escalates decisions which should be made on his level." (Exhibit C-23). Mr. Peterson testified that this was a reference to Teresa Oglesby going to Lenny Peterson and asking for a promotion in the spring of 1987 (Tr Peterson 4/28/89 p 143). The first time Mr. McCuiston knew that Mr. Peterson was upset or concerned about this was upon receipt of his unsatisfactory MAS. (Tr McCuiston 6/6/89 p 167). It was appropriate for Miss Oglesby to go directly to Mr. Peterson because he was the one making the decision as to the SE-6 position she wanted. Mr. Peterson had weekly morning meetings with the staff including Miss Oglesby, and had told them that if they had any problems that they could come to him. She had met with Mr. Peterson before. She did not go to Mr. McCuiston about the position because she had no reason to go to Mr. McCuiston. (Tr Oglesby 4/25/89 p 205, 210; Tr Peterson 4/28/89 p 146). Teresa Oglesby did not tell Mr. Peterson that Mr. McCuiston had sent her to his office. She discussed with Mr. Peterson her concern that she might be passed

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over for a promotion because of being a black female. Miss Oglesby did not indicate in any way to Mr. Peterson that she could not talk to Mr. McCuiston about it. (Tr Peterson 4/28/89 p 143-145). To Miss Oglesby's recollection, Mr. McCuiston did not know about her meeting with Mr. Peterson. (Tr Oglesby 6/6/89 p 159). Mr. Peterson did not

reprimand Mr. McCuiston or express any dissatisfaction to him concerning this incident until the issuance of the unsatisfactory MAS. (Tr Peterson 4/28/89 p 147).

B. Clamps/CCTS

Mr. Peterson testified he rated Mr. McCuiston low on planning and organizing skills because of rescheduling of items with the CCTS¹⁵ (Tr Peterson 4/28/89 p 136). However, he admitted he did not know whether Mr. McCuiston was called in to help with the project because the former project leader, Mr. Gary Tippens, was taking so long on the project. (Tr Peterson 4/28/89 p 137). The extensions requested by Mr. McCuiston had been approved by Mr. McCuiston's supervisors including Mr. Peterson. (Tr Peterson 4/28/89 p 138; Tr McCuiston 4/25/89 p 31). The clamp/CCTS items was a project in which Mr. McCuiston's inspectors found problems in the field while on loan to Gary Tippens. The inspectors found that some of the contract personnel had voided out a portion of required clamps. The inspectors contacted the NRC. After the meeting with the NRC, Mr. McCuiston was put in charge of the project to resolve the problem and he was to report to the NRC. (Tr McCuiston 4/25/89 p 28; Tr McCuiston 6/6/89 p 164-165). Mr. Peterson testified that he ranked Mr. McCuiston second from the bottom in the ranking meeting in September 1987 due to his planning and organizing skills, referring to the clamps/CCTS. Gary Tippens was in charge of that project in the beginning and Mr. Peterson admitted that Mr. McCuiston assumed those responsibilities in January 1987, he had to assume the responsibility for past work done by Mr. Tippens. (Tr Peterson 4/28/89 p 136-137). Mr. McCuiston never received any reprimand or any warning regarding the CCTS, until he received his unsatisfactory MAS. (Tr McCuiston 4/25/89 p 28- 31).

C. Panel Procedures

TVA's rating of Mr. McCuiston-complainant's position

The complainant takes the position that TVA's rating of Mr.

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McCuiston was inconsistent with the ratings of others not engaging in protective activity. On this point the complainant explains as follows: Johnfred Carlton who failed to write a CAQR in a timely manner in the fall of 1987, after being told to do so by his superior, was rated as solid performer on his fall of 1987 MAS. (Exhibit C-81). Mr. Johnson testified that the time lapse between his order directing that the CAQR be written and it finally being written was unacceptable. Although Mr. Johnson said he verbally reprimanded Mr. Carlton, Mr. Carlton received an adequate rating on his next evaluation and an increase in pay or bonus. (Tr Johnson 4/27/89 p 184-185 Exhibit C-33). Gary Tippens was rated a solid performer for the year ending September 30, 1987. He was ranked 32 in the numerical ranking (Tr Kazanas 6/7/89 p 69-70 Exhibit C-80). Mr. Kazanas testified that he did not know whether there were problems with Gary Tippens in

1986 because he was not there, but he knew that there were problems after he came in 1987 and those problems developed prior to October 1, 1997. There were a lot of problems that were related to inspections and adequacy of inspections. (Tr Kazanas 617189 p -68 Tr McCuistion 6/6/89 p 163-164). There were a lot of questions relating to the integrity of the inspection program at WNP. (Tr Kazanas 617189 p 67-68). Other managers had problems with Mr. Gary Tippens too. (Tr McCuistion 6/6/89 p 179). As shown on Exhibit C-81, Mr. Lenny Peterson was second from the top with an exceptional rating. He received an 8% portion of the bonus. Mr. Peterson's 8% was the highest percentage in Mr. Johnson's organization. (Tr Johnson 4/27/89 p 166, 168 to 169 Exhibit C-81). In early October, Mr. Hoyt Johnson told Mr. Kazanas that the CAQR was resolved. Later Mr. Kazanas found out that the issue had not been resolved in early to mid October. He found out that the organizational unit had failed. He did not take any action against Mr. Johnson with the exception of reviewing the corrective action request which looked at the timeliness (Tr Kazanas 4/28/89 p 258). Although Mr. Kazanas testified that Mr. Johnson's HAS reflected problems with the timeliness of the carrying out the responsibility to resolve the problem with the CAQR, Mr. Johnson's HAS for October 1, 1987 to September 30 1988 rated him as a solid performer. Mr. Kazanas testified under leadership, Mr. Johnson received a low score. Mr. Johnson still received a percentage increase in pay as a result of his evaluation. (Tr Kazanas 4/28/89 p 259-260 Exhibit C-81).

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Mr. McCuistion's Work Performance

Inspectors who had worked under Mr. McCuistion testified that he was an excellent supervisor. They said that they could talk to him about a problem and if he could not answer your question, he would get an answer for you. If he thought you were wrong about something, he would tell you. He was very understanding and communicated well with employees. He was always willing to listen to problems, even personal problems. He was able to get the production and work out of his employees. (Tr Willoughby 4/25/89 p 126-127 Tr Huddleston 4/26/89 p 180). As a manager who had interacted with Mr. McCuistion on a equal level, Mr. Cochran testified that Mr. McCuistion was cooperative with the other units; he treated his supervisors with respect; and was a good supervisor himself (Tr Cochran 4/26/89 p 262-264). As mechanical QC supervisor, Mr. Milford Terry interacted with Mr. McCuistion as supervisor to supervisor. They had an excellent working relationship and no problems. (TR Terry 4/26/89 p 213). Teresa Ogelsby described Fred McCuistion as a very good communicator and an excellent supervisor. He directed the work of those under him and deserved to be supervisor of the unit. She had worked under Mr. McCuistion as an associate prior to his becoming a supervisor while they were both employed in the instrumentation unit from 1978 on and later as an inspector in his unit (Tr Ogelsby 4/25/89 p 211).

Management Appraisal System (MAS)

The complainant takes the position that TVA deviated from its routine procedure in disciplining and rating McCuistion in the fall of 1987. The complainant explains his position as follows: The period of the evaluation for a MAS is a fiscal year which is October 1 to September 30 of the next year. If there are problems with an employee, good management would require that the employee would be warned of the problems before they turn up in a written form on a HAS. Additionally, the employee needs to be given time to improve any problems in performance. (Tr Kazanas 4/28/89 p 237-262). Milford Terry received an unsatisfactory HAS in the fall of 1987 but he had a warning from his supervisor prior to receipt of the unsatisfactory MAS. On three different occasions, he met with his supervisor who told him to conform to his way of thinking or it would be reflected on his service review (Tr Terry 4/26/89 p 219-220). Mr. Terry a manager himself, would warn an employee he was supervising before a problem showed up on the employees service review or

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evaluation. In 1987 the procedure started with an oral warning, then a written warning, then up the lines of disciplinary actions. They were doing quarterly reviews. (Tr Terry 4/26/89 p 217). In her investigation of the management appraisal system, Ms. Brady Jones, of the Office of Inspector General found that if an individual was performing "unsatisfactory", he or she must. be given four quarterly reviews on their performance. (Tr Jones 4/26/89 p 62).

Mr. McCuistion's unsatisfactory MAS applied to the period October 1, 1986'to September 30, 1987. Under TVA procedure, McCuistion should have been notified of any problems prior to receipt of the unsatisfactory HAS and should have been given the opportunity to correct them. The disciplinary letter was not considered a warning for the fall of 1987 HAS. Mr. McCuistion did not receive the letter until October 5, 1987. Under TVA procedure, the letter should not have influenced Mr. McCuistion's MAS which covered the prior year in which no warning was given. (Exhibit R-43 Exhibit 43-A Exhibit C-23 Peterson 4/28/89 p 109- 110). Mr. McCuistion was not warned of any problems in time to correct them before receipt of the fall 1987 unsatisfactory HAS. (Tr McCuistion 4/24/89 p 86 Tr McCuistion 6/6/89 p 162).

Get Well Plan

Mr. Kazanas required get well plans for each of his employees that have fallen below certain levels in performance. The Get Well Plans were to correct the problems and were to be developed within approximately two months of the employee being told of any problems he or she had. The outside limit might have been two months (Tr Kazanas 6/17/89 p 19-20). Mr. Johnson and the other managers were given instructions by Mr. Kazanas to develop the get well program or recovery programs for those managers whose performance was less than solid performer. Cognitive improvements would be made to this action plan. Then an interim MAS would be done to check on the progress. Six months was the time frame. (Tr Johnson 4/27/89 p 68-69). Mr. Peterson gave Mr.

McCuistion his get well plan (Exhibit C-37) on June 6 or 7, 1988 much more than two months after his unsatisfactory HAS. At the same time, Mr. Peterson gave Mr. McCuistion his quarterly MAS (Exhibit C-79) in the same package. His quarterly HAS showed he was a solid performer. (Tr McCuistion 4/25/89 p 25-26 Tr Peterson 4/28/89 p 36, 149 to 150). Mr. Peterson testified that his giving the get well plan after Hr. McCuistion had made the

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improvement was not after the fact. (Tr Peterson 4/28/89 p 152- 153).

Forced Distribution

As part of her investigation, Brady Jones reviewed the MAS process at TVA. She obtained comments from personnel officers within TVA's main personnel department and found forced distribution was not advocated by personnel but that the nuclear power office did not need permission in order to implement forced distribution. (Tr Jones 4/26/89 p 59-61). Mr. Kazanas testified that the forced distribution for 1987 was imposed upon the nuclear power organization in TVA. (Tr Kazanas 61 7189 p 6). The first time that Mr. Johnson saw a forced distribution in practice at TVA was during 1987. Mr. Johnson did not know whether forced distribution was used by any divisions other than nuclear power within TVA. (Tr Johnson 4/27/89 p 159-160).

Hoyt Johnson did not have to meet any specified percentages with his particular organization WNP under forced distribution. (Tr Kazanas 617189 p 7). Mr. Johnson did not have to have any people receive an unsatisfactory in order to comply with the bell curve. The 2% to receive an unsatisfactory applied overall. It did not apply to any of the particular plants. (Tr Kazanas 4/28/89 p 280). Mr. Kazanas did not have any document showing the satisfaction of the bell curve rating from any other nuclear plants (Tr Kazanas 4/28/89 p 281). Mr. Kazanas also received from Mr. Johnson the performance ratings with the managers listed by name and their rating as to whether they were exceptional down to unsatisfactory in the fall of 1987. (Tr Kazanas 4/28/89 p 276-277 Exhibit C-81). Mr. Kazanas testified that he searched for similar documents showing the same information from other nuclear plants but found nothing except the document marked as Exhibit C-84 which is from his technical support branch. Exhibit C-84 shows the ratings going from adequate to exceptional with no unsatisfactory (Tr Kazanas 4/28/89 p 278). Forced distribution was discontinued in 1988 (Tr Johnson 4/27/89 p 169-170 Tr Kazanas 6/6/89 p 5 Exhibit C-32). *TVA's Negative Attitude Toward Protective Activity*

Complainant alleges that TVA management displayed a negative attitude toward protective activity. Complainant explains this issue as follows:

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Complainant's Exhibit-48 is a letter from Admiral White, Manager of nuclear power, regarding harassment and intimidation. Mr. McCuiston received a copy of this letter. This letter shows there had been problems with harassment and intimidation of employees at Watts Bar since 1986. (Tr McCuiston 91-92).

A. Jim Moore

Jim Moore had always received better than a fully adequate. evaluation. only after his involvement in the CAQR and support of Mr. Willoughby and Mr. McCuiston's position, did he receive his first adequate on a MAS. Mr. Moore had not received any reprimand or warning that he was cut off from the daily staff meetings. After Jim Moore had been interviewed by the OIG investigator, he was transferred to another supervisor, Marty Johnson. He was told from the outset by Ms. Johnson that she did not like him or his attitude. Mr. Moore noticed that after each visit from Mr. Peterson, Hiss Johnson would call Mr. Moore into her office and "chew me out" (Tr Moore 4/25/89 p 164-166). When Hiss Johnson went on vacation or was out of the office, she put a clerical person in charge rather than Mr. Moore who was a manager and directly under her. Before Mr. Moore could go on leave, he had to ask permission from his secretary. (Tr Moore 4/25/89 p 167-168). Mr. Moore had three other supervisors after Miss Johnson during a time when Linda Smith was gone for six months Julia Graves took her position. Mr. Moore was also given an MAS review during this time. Miss Graves came to him and said "I want you to realize one thing. I had nothing to do with this MAS review; this came strictly from Lenny Peterson and Marty Johnson. I am ashamed to give it to you, because ... you have worked for me for six months and this is not the way I would have rated you." (Tr Moore 4/25/89 p 169). In this HAS dated March 29, 1989 Mr. Moore was rated only adequate when he had been rated better than fully adequate previously. (Exhibit C-54). Hiss Graves added an attachment to the MAS because she did not agree with the rating. The reviewer of the HAS was Hoyt Johnson. Mr. Moore also received an adequate rating in the fall of 1987. He received this rating from Mr. Peterson. (Tr Moore 4/25/89 p 177-180).

B. Terry Huddleston

Shortly after Mr. Huddleston's testimony at this hearing in April 1989 he was sent on loan to the division of nuclear engineering. His duties were to run copies and place them in

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binders. (Tr Huddleston 6/6/89 p 121). The division of nuclear engineering is not a part of quality assurance, so Mr. Huddleston was not working with the people from quality control. He was told that he was being sent on loan because he had failed the NVE eye examination. NVE eye exam has to do with welding inspection. (Tr Huddleston 6/6/89 p 122-123). Mr. Huddleston is not a welding inspector. (Tr Huddleston 6/6/89 p-149). Another person who failed the eye exam was not sent on loan to Mr. Huddleston's

knowledge. (Tr Huddleston 6/6/89 p 123). Mr. Huddleston felt that his being sent on loan was a form of harassment for his testimony in the hearing in this matter in April 1989. (Tr Huddleston 6/6/89 p 126). Mr. Huddleston verbally refused to wear the corrective eye wear during close inspection. Mr. Hitson told Mr. Huddleston that he had discussed the situation with Mr. Peterson (Tr Huddleston 6/6/89 p 142). Under Mr. Hitson's orders Mr. Huddleston would have to wear his protective eye wear to perform inspections. (R-62). Under medical order R-63, Mr. Huddleston could wear corrective eye wear for far vision but not wear them for his close inspection. (Tr Huddleston 6/6/89 p 147). Mr. Huddleston asked Mr. Hitson for something in writing showing that he was required to wear his far vision corrective eye wear for close inspection. Mr. Huddleston then received a written reprimand for insubordination. Mr. Huddleston had worked at TVA for 12 years and has never received a write up or any kind of reprimand. Mr. Huddleston believes that he is being harassed for testifying on Mr. McCuiston's behalf at the April hearing. (Tr Huddleston 6/6/89 p 129).

DAMAGES CLAIMED BY COMPLAINANT

The complainant alleges that he has incurred significant monetary damages as the result of TVA's retaliation against him. Claimant maintains that the unsatisfactory HAS hindered his opportunity to get other jobs. Mr. McCuiston's salary at TVA was \$40,450.00 per year. (Tr McCuiston 4/24/89 p 151). If Mr. McCuiston had been rated a solid performer on his fall 1987 MAS, he would have received at least a 5% raise, making his salary from October 1987 to October 1988 \$42,472.00. (Tr McCuiston 4/25/89 p 153). On the date of the hearing, Mr. McCuiston's back pay for the eight months from October 1988 to April 1989 amounted to \$28,315.00 (Tr McCuiston 4/24/89 p 184). Following Mr. McCuiston's termination from TVA, he made numerous attempts to find comparable employment. (Tr McCuiston 4/24/89 p 149-151 Exhibit C-53). Mr. McCuiston has been unable to find other

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employment. He has been turned down by all potential employers (Tr McCuiston 4/24/89 p 151).

Mr. McCuiston testified that he is 50 years old and had planned to retire upon reaching age 55 (55). His front pay for five years based upon the salary of \$42,472.00 amounts to \$212,360.00. (Tr McCuiston 4/24/89 p 156). Mr. McCuiston had paid into life insurance at TVA for many years. Upon his termination of employment with TVA Mr. McCuiston lost the life insurance. While employed at TVA, TVA completely paid for Mr. McCuiston's health and dental insurance. Upon termination from TVA Mr. McCuiston lost these benefits. (Tr McCuiston 4/24/89 p 157; Exhibit C-50, C-67).

On the date of the April hearing, Mr. McCuiston had incurred expenses in the amount of ,004.25 in search of other employment and pursuing this litigation. (Tr McCuiston 4/27/89 p 4-5).

Upon his termination Mr. McCuiston received project life and severance pay in the amount of \$31,000.00 after taxes. (TR McCuiston p 157-158; Exhibit C-50, C-67).

Physical and Emotional Damages

Mr. McCuiston claims that he suffers from high blood pressure and did so prior to September 2, 1987. He states that on the day he left TVA his blood pressure was 226/116 and the doctor told him to go home and get out from under the stress. He believes the stress he was under at TVA aggravated his medical problem. (Tr McCuiston 4/24/89 p 162). Mr. McCuiston testified as his wife tells him, that he was grouchy, yells a lot and was depressed. (Tr McCuiston 4/24/89 p 165).

Mrs. McCuiston testified that after her husband had been told in the fall of 1987 they were going to run him off, he became increasingly worried that he would lose his job. He became more withdrawn, got upset over trivial matters, had many sleepless nights, had more stomach problems, and became obsessive about his blood pressure. About a month prior to the hearing in this matter, Mr. McCuiston was taken to the emergency room with stomach and blood pressure problems. (Tr McCuiston 4/27/89 p 11 to 14).

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is undisputed that TVA is an employer and a Commission licensee within the meaning of the ERA. It is undisputed that the complainant was an employee within the meaning of the ERA and was entitled to protection from discrimination by his employer.

The complainant is pursuing his claim for relief in this proceeding under the provisions of the Energy Reorganization Act (ERA). The pertinent portions of 42 USCA 5851(a) provide as follows:

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. S 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.).

29 CFR, Part 24 contains the regulations promulgated by the

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Department of Labor setting forth the procedures for the handling of discrimination complaints under federal employee protection statutes.

29 CFR 24.2 entitled obligations and prohibited acts, recites in 24. 2(b) as follows:

- (b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has:
 - (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced a proceeding under one of the Federal statutes listed in § 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
 - (2) Testified or is about to testify in any such proceeding; or
 - (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

This case consumed seven days of trial. Presentation of the case was supported by eighty eight exhibits and produced over 1600 pages of recorded transcript. Both parties filed briefs as directed by the Court. Both parties indicated that it was undisputed that the complainant was an employee within the meaning of ERA and was entitled to protection from discrimination by his employer, and agreed that TVA is the employer and is a Commission licensee within the meaning of the ERA. The parties disagreed on all main issues which the Court is asked to resolve in deciding the merits of the case. The Court found it necessary to include the extensive summary of the evidence for proper consideration and evaluation of the issues in this case.

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ISSUES

The main issue for decision is do the facts contained in this record establish entitlement to the relief sought by the complainant, pursuant to the provisions of the ERA. In more precise terms, did TVA violate the ERA by terminating the complainant's employment or otherwise by discriminating against him with respect to his compensation, terms,

conditions or privileges of employment because of the complainant's engaging in or participating in an activity protected under the law.

TIMELINESS

TVA takes the position that all claims arising more than 30 days before the filing of the complaint on August 19, 1988 are time barred by statute 42 U.S.C. § 5851 (b) 9a) (1982); 29 CFR § 24.3 (b) (1988). The time bar excludes the disciplinary letter of September 4, 1987 and the MAS of November 19, 1987. The only alleged discriminatory actions not barred by statutory limitations are the complainant's RIF and his non-selection for the E and I & C supervisor position. (TVA Brief p. 78)

Complainant maintains that TVA's retaliatory conduct toward Mr. McCuiston shortly after his engaging in protected activity in early fall 1987 "is a valid part of this cause and is not time barred." Complainant also argues that TVA's violation of the ERA was continuing as Mr. McCuiston was and still is black listed by TVA"....TVA's retaliatory conduct in the fall of 1987, Continuing and culminating in Mr. McCuiston's termination is not time barred." (Complainant's Brief p. 68). Specifically, complainant argued that there is no statute of limitations problem in this case, because this was a continuous activity and a discriminatory conduct on the part of TVA that began in September 1987 at the time of the Stop Work Order and continued and concluded in the termination of Mr. McCuiston in August 1988. The protected activity involved the Stop Work Order violation, the disciplinary letter issued to Mr. McCuiston immediately thereafter, the unsatisfactory MAS, in November 1987, the TVA manager's continuous discriminatory attitude toward Mr. McCuiston from then on until and including his elimination in the summer of 1988. (Tr. Vol I p. 27-28).

CONCLUSION OF THE COURT

Upon careful review of all the evidence, including the exhibits and testimony of all the witnesses, contained in the seven volumes of transcript, the Court concludes that there is

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substantial evidence to support a finding that TVA management did engage in a course of conduct which may reasonably be characterized as a continuing course of harassment. A review of the evidence discloses that management adopted and put into effect an ongoing discrimination policy toward the complainant which accompanied his on-the-job activities including those relating to safety and quality. The evidence is clear that management was not at all pleased when complainant personally inspected the work in the diesel generator building on the night of September 2, 1987 and directed that a violation of the stop work Order was present and would require a CAQR. This was understandably repugnant to upper management since the space which contained the offending maintenance work was to be displayed as a model of quality and safety to the highest ranking nuclear officials on their inspection visit scheduled for the following

morning. Management was compelled by the facts to declare a violation of the SWO and to accede to the institution of a CAQR which was executed by a protracted process requiring a second CAQR due to untimeliness caused by the resistance of management to the issuing of the CAQR proclaimed by the complainant.

It thus appears that the impact of the episode of the Stop Work Order and CAQR was severe enough to merit the adoption of the continuing policy of discrimination toward the complainant by his upper management supervisors. It is significant to the Court that the complainant's immediate supervisor Mr. Anderson rated the complainant at a level totally contradictory to the negative and unsatisfactory rating adopted by upper management. The evidence clearly establishes that the complainant was not rated by upper management according to the level of superior performance he consistently maintained and which was readily acknowledged by his immediate supervisor, Mr. Anderson, and by his peers and subordinates.

The evidence amply discloses that the rating of unsatisfactory on complainant's MAS was the result of a continuing effort by upper management to find reasons to justify an unsatisfactory rating and thereby place the complainant in the status of a substandard performer and unfit for managerial responsibility. This was clearly his dimension when the complainant's name appeared for selection for the position of E and I and C supervisor and in his search for a job and/or expectation of appointment to continue working for TVA.

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The Court finds and concludes from the evidence that it was not until it became evident in August 1988 that the claimant was released to go home that the policy of discrimination and harassment had run its full course having attained its ultimate objective namely to "run Mr. McCuiston off". Prior to being sent home the complainant had no way of knowing that his job performance was being scrutinized according to an ongoing policy which would bring about his permanent removal from TVA positions at the management level. The record evidence is clear that management could have had placed him in a position commensurate with his experience and 15 years of TVA service rather than close the door upon his dismissal without making any effort to retain a valued workman whom TVA trained regularly throughout the years.

As an additional observation, Whistleblower Acts have a broad remedial purpose of protecting workers from retaliation based on their concerns for safety and quality. The complainant established a reputation as being aggressive in the apprehension of and rectifying violations as to quality and safety and was strongly inclined to go by the rule. It is obvious that the Whistleblower Act is intended to protect this type of performance and extends its support to this complainant's grievance.

There is evidence that the complainant was criticized by his upper management for his failure to join the management team. His immediate supervisor Mr. Anderson was

charged with failure to control the complainant in the performance of his supervisory duties. In turn, there is evidence that the complainant did not trust upper management in matters of reporting problems and violations of quality and safety and was disciplined for allowing his subordinates to report problems to the NRC and ERC.

The whistleblower provisions in the Energy Reorganization Act serve the remedial purpose of protecting workers from retaliation based on their concerns for safety and quality. Quality control inspectors, such as were supervised by the complainant, play a crucial role in the NRC's regulatory scheme. The NRC regulations require licensees and their contractors and subcontractors to give inspectors the "authority and organizational freedom" required to fulfill their role as independent observers of the construction process 10 C.F.R. Part 50. App B. at 413. In a real sense, every action by quality control inspectors occurs "in an NRC proceeding," because of their duty to enforce NRC regulations. (*Mackowiak v. University Nuclear Systems, Inc.* 735 F 2d 1159, 1163 (1984).

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BURDEN OF PROOF

Principles enunciated in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248 (1981), were adopted by the Secretary of Labor for ERA cases in *Hedden v. Conam Inspection*, No. F2-ERA-3 (June 30 1982):

Pursuant to these principles, the employee must make out a *prima facie* case of discrimination. The employer then has the burden of articulating some legitimate nondiscriminatory reason for the employee's discharge. The employee must have the opportunity to prove that the reasons offered by the employer were not the true reasons but were pretexts. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains with the employee [Slip op. at 3].

PRIMA FACIE CASE

The complainant must make out a *prima facie* case of discrimination. A discrimination claim under § 5851 must include proof:

- (1) that the party charged with discrimination is an employer subject to the Act;
- (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and
- (3) that the alleged discrimination arose because the employee participated in an NRC proceeding....*Mackowiak, supra*, 735 F 2d 1159, 1162

It is undisputed that TVA is an employer subject to the Act. The fact of complainant's discharge is not in dispute. The

complainant asserts and TVA denies that the following episodes displayed acts of discrimination by TVA: 1) complainant's participation in the Stop Work Order, 2) complainant's employees taking matters to the NRC and ECP 3) disciplinary letter by upper management 4) complainant's unsatisfactory MAS, 5) elimination of complainant by RIF, 6) non-selection of complainant for E and I & C supervisor.

I have concluded from all the evidence that the complainant has established that he was discharged and otherwise discriminated against with respect to conditions of his employment and that the alleged discrimination arose because of the complainant's participation in protected activity and aggressive performance of his duties as a supervisor of inspections for safety and quality.

ANALYSIS OF THE EPISODES

(1) Stop Work Order (SWO)

On September 2, 1987 the complainant informed upper management that the maintenance work performed in the diesel generator building area contained a violation of the SWO. The complainant made this decision after personally inspecting the area which had been readied for a top management inspection scheduled for the following morning. TVA argues that the complainant was a brief participant in the scenario of events which transpired during the several months prior to issuing the CAQR on January, 6, 1988. There is substantial evidence that the aggressive pursuit of the violation by the complainant's subordinates was not enthusiastically accepted by upper management who displayed deep concern as to the impact the CAQR would have on performance by upper management. It is noted that the complainant was faulted on his HAS for work performed by his subordinates during his absence, as upper management based its justification upon the fact that the complainant was responsible for the acts of his subordinates, even though he was not present during the period of their work performance. It follows that even though complainant was a modest participant in the execution of the CAQR, he was the supervisor of the quality control members who actively pursued its execution and thereby brought on considerable occasions of disharmony in upper management circles. Mr. Anderson informed the complainant about the distress of upper management caused by the complainant's workers in pursuing the

CAQR and upper management was going to "run Mr. McCuiston off" because of it.

In establishing the existence of a violation of the SWO, the complainant was consistent with his method of aggressive enforcement of quality and safety standards promulgated by NRC. I find from the evidence that upper management retaliated by maintaining a

continuing course of harassment of the complainant which ultimately resulted in his discharge from employment by TVA.

(2) Complainant's employees taking problems to NRC and ECP (considered in MAS discussion - below).

(3) Disciplinary letter by upper management.

The disciplinary letter was dated September 4, 1987 but was received by the complainant on October 5, 1987. Although the letter was from Mr. Anderson the complainant's immediate supervisor, it was authored by higher management. Prior to receiving the letter the complainant had no knowledge of any problem affecting his work performance. Upon his receipt of the letter the complainant did not understand what the letter referred to. While the letter was worded as an ultimatum prohibiting repetition of a recurrent unsatisfactory performance, the complainant never received a notification or warning prior to the issuance of the letter that such improper performance had ever occurred in the past by him or by his employees. While this letter was not placed into the complainant's personal history record, its text did present itself in his next performance evaluation (MAS).

This letter with its text and authorship is consistent with my finding that the upper management, which did not include his immediate supervisor, Mr. Anderson, was following through with a continuing policy of harassment of the complainant even as it related to the performance of his duties directly concerned with safety and quality.

(4) Unsatisfactory MAS

The Mas in issue here was a written evaluation of the complainant's work performance for the period October 1, 1986 to September 30, 1987. All members of management were to be

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evaluated for this same period pursuant to a method of forced distribution devised by top management. This required rating each member so that a bell curve pattern was maintained for the assembly of management being evaluated. While top management expected that forced distribution method would result in placing a small percentage rated unsatisfactory, there was no quota assigned to any particular segment of operation, such as electrical or instrumentation quality control.

After close study of all the evidence I have concluded that the complainant's MAS was rated unsatisfactory by upper management in retaliation for his aggressive attitude to maintain the precise standards of quality and safety as prescribed by the nuclear law and regulations. I also find that the complainant's adamant insistence that a violation of the SWO had been perpetrated and the strong support of his employees in pursuing the

CAQR were a strong factor in causing distress to upper management which retaliated by adopting a continuing policy of discrimination against the complainant.

There is substantial evidence that the complainant's immediate supervisor, Mr. Anderson, never agreed to the unsatisfactory rating and was unwavering throughout the entire period in his high esteem and respect for the complainant's work performance as a supervisor of an instrument quality control unit. Nonetheless he was disarmed by his superior who insisted upon labelling the general evaluation of the complainant as "unsatisfactory" which he justified with lowest grade rating which were not supported by Mr. Anderson. Once the "unsatisfactory" label was attached to the HAS, it remained unchanged as would be expected, throughout the process of review described by the testimony of upper management.

After the complainant reported his unsatisfactory HAS to the NRC, his complaint of retaliation was forwarded to the Office of Inspector General. The investigation was performed at considerable length and depth by Ms. Jones who appeared as a witness called by the complainant at the hearing. During her investigation, Ms Jones had spoken to Mr. Anderson and to members of upper management who responded to her questioning about Mr. McCuiston's claim of retaliation.

Upon completion of the investigation the investigation

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concluded and reported that Mr. McCuiston was the subject of harassment and intimidation (Ex C-54, C-88). Thereafter, the Department of Labor notified TVA of its finding based on its investigation that discrimination as defined and prohibited by statute was a factor in the actions which comprise the complaint, and expressly noted that the unsatisfactory rating MAS was a discriminating act which affected his subsequent employment prospects at TVA (CX-52).

The complainant's employees did report problems to the NRC and ECP. The OIG investigation revealed that both Mr. Gerald Brantley of ECP and Mr. Glen Walton of the NRC had discussed with upper management the fact that Mr. McCuiston's subordinates reported problems to ECP and NRC. At a meeting attended by Mr. Anderson, upper management announced that "we were going to make MAS reviews measurable such as for people that go to NRC and ECP" (Ex. C-91). The evidence is clear that upper management had full knowledge of the problem reporting to NRC and ECP by complainant's subordinates at all times. The overall rating of unsatisfactory on the complainant's HAS is consistent with reflecting in part the admonition of upper management that such reporting by subordinates will be a negative factor in the rating.

Prior to the issuance of the unsatisfactory MAS in the fall of 1987, the complainant had received a performance record of solid performer in all skills and superior rating in planning and organization and controlling (CX-8) for the period May 26, 1986 to

September 30, 1986. Prior to that time he received high ratings from all his supervisors. During his employment with TVA Mr. McCuiston received several commendation letters and recognition for his outstanding work (C-9, C-1), C-12), C-13). He was also selected as the outstanding WNP Employee for July 1981 and was in the top six in the selection of Employee of the Year (Tr 4/24/89 p 49). His entire working record at TVA is in total conflict with an unsatisfactory rating. I am compelled to conclude that the evidence throughout the record in this case does not support finding a justification for the conclusion reached by upper management that Mr. McCuiston's performance at TVA for the period October 1, 1986 to September 30, 1987 fell below the satisfactory standard and earned the rating of unsatisfactory as determined by higher management, but not assented to by his immediate superior, Mr. Anderson. I find that the rating of unsatisfactory Was motivated by the continuing

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policy of upper management based upon its opposition to the complainant's aggressive attitude toward preserving and maintaining the standards set by NRC for quality and safety.

(5) Elimination of Complainant by RIF

Complainant alleges that the elimination of his position in a RIF was discriminatory. It is TVA's position that the RIF and elimination of complainant's position were undertaken for legitimate nondiscriminatory reasons relating to a reorganization and reduction of costs.

The reorganization of upper management was announced on May 18, 1988 and a general reorganization and RIF of some 7,500 employees announced on June 29, 1988. The reorganization chart was prepared by Mr. Johnson and showed the elimination of a layer of management positions which included Mr. McCuiston's position (R-10). The retention register was drawn up to show rank of employees and which would be Rifed (EX C-76). In the RIF, the electrical and instrumentation positions were combined, the welding position eliminated, civil position and mechanical positions retained, hanger and mechanical positions were combined (Tr Johnson 4/27/89 p. 124).

Mr. McCuiston received a RIF letter and was terminated from TVA effective August 25, 1988 (C-38). Mr. McCuiston was the only manager under Mr. Peterson who went home as a result of the RIF (Tr Peterson 4/28/89 p. 157, 180).

The evidence is uncontradicted that all the managers listed in the memorandum dated July 1, 1988 (Exhibit R-10), expecting to be Rifed, are still working at TVA with the exception of Bob Forston, Fred M. McCuiston and Burt Hammer. Forston was not RIFED involuntarily. Hammer was offered a shift coordinator job at TVA, but left TVA shortly after accepting the job. Morton was asked by Mr. Johnson to interview for a job on the day before he was to leave TVA. He was appointed to the job in Quality

Surveillance. Morton had no experience in surveillance work and had not applied for this job. Mr. Ed Burke testified that he had gone from one position to another without having applied for the new position. Milford Terry stated that his name appeared on the retention register with a termination effective date of August 25, 1988, however, he never received a RIF notice. Mr. Johnson decided after the retention register was prepared but

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prior to the sending of RIF notices, that Milford Terry's position would not be eliminated.

Jobs were available at TVA and were taken by many people within TVA who were ordered to be RIFed. Complainant went to the job fair in the summer of 1988 in search of a job. Mr. McCuistion was not offered a job of any kind with TVA and was effectively sent home as directed by the RIF Memo. At no time did upper management show interest in retaining the expertise of quality and safety control developed by the complainant. I find from all the evidence that TVA upper management released the complainant from his position at TVA consistent with its continuing policy of discrimination and harassment of the complainant in retaliation for his aggressive application of standards prescribed by NRC for safety and quality of operation.

When management decided upon a major reorganization and a reduction in force of some 7,500 employees its goal was to improve the efficiency of plant operation by management and support personnel. Complainant does not attack the propriety of the decision for reorganization with its attendant RIF but alleges discrimination as to the application of the RIF to his position in the establishment.

I find substantial evidence exists in the record that the complainant's separation from his job was the result of discrimination by upper management which was intended to remove the complainant from any employment at TVA and particularly at the management level. The RIF came at a time when upper management could make claim that removal of the complainant from his job resulted as a natural consequence of the reorganizational plan and not for any other reason. While it does appear that TVA may justify the elimination of the complainant's position due to the reorganization, TVA has failed to prove that the complainant was sent home as a necessary result of the reorganization, and not, as alleged by the complainant, as a result of its harassment and discrimination policy toward the complainant.

Non-Selection of Complainant for Electrical, Instrumentation and Control Supervisor Position (E, I and C)

The reorganization eliminated the complainant's position as instrument quality control supervisor and combined it with Electrical Quality Control. The complainant formally applied for

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this new position promptly upon its announcement to the work force. Mr. McCuistion did not get the job. Upper management had full information about the claimant's training and experience in electrical work but decided that he was not qualified for this job. Mr. McCuistion never heard from management with respect to his job application.

The position of E, I and C supervisor was not filled as of the date of the hearing in this case in April and June 1989. Mr. Hitson applied for this same position but was not offered the job because he too, like Mr. McCuistion, was considered unqualified. Nevertheless at the time of the hearing Mr. Hitson had been the acting supervisor of the E, I & C unit since September 1988. Mr. Hitson had no experience in instrumentation when he became acting supervisor of E I & C and did not meet the educational equivalent for the job of E I & C supervisor. He was on the list to be RIFED in his SE level but was selected to fill the management level position of shift coordinator (Tr. Nixon 6/6/89 p 75-76). He now occupies both positions.

From all the evidence I conclude that the decision of upper management not to retain the complainant in any position with TVA commensurate with his training, experience and expertise was based upon the continuing policy of discrimination towards the complainant because of his over dedication to and strong insistence upon compliance with the regulated standards for quality and safety.

DUAL MOTIVE DISCHARGE UNDER SECTION 5851

In dual motive cases, the employer bears the risk that "the influence of legal and illegal motives cannot be separated ... " *NLRB v Transporation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 2475.

In *Mt. Healthy City School District v Doyle*, 429 U.S. 274, 97 S.Ct. 568, 506 Ed 2d 471 (1977) the Supreme Court created a two-part test for "dual motive" cases. Under it, once the plaintiff has shown that the protected activity "played a role" in the employer's decision, the burden shifts to the employer to persuade the Court that it would have discharged the plaintiff even if the protected activity had not occurred.

In this case I conclude that TVA has not met its burden and

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has not persuaded this Court that it would have discharged the complainant even if the underlying animus towards the complainant had not been present. To the contrary, it would appear from his work record alone with TVA that upper management would make every effort to retain Mr. McCuistion in some position commensurate with his qualifications, just as it had done with other valued personnel in repeated instances disclosed in the course of these proceedings.

DAMAGES

Recommended Order of Damages

Accordingly, in view of the conclusions reached by this court as explained herein, I find the complainant is entitled to damages and recommend that the Secretary of Labor order relief and reimbursement as follows:

(1) TVA is ordered to reinstate the Complainant in a position commensurate with his experience, expertise, compensation and position he held at the time of his termination of employment in August 25, 1988.

(2) TVA is ordered to reimburse complainant for all back pay from August 25, 1988 to the date of entry of this order including increase in pay resulting from restoring complainant to solid performer status in his MAS for this period.

(3) TVA is ordered to restore all the benefits, terms and conditions of his employment in effect in August 25, 1988.

(4) TVA is ordered to reimburse the complainant for all expenses he incurred in searching for a job, totalling ,004.25.

(5) TVA is ordered to cease and desist from any discrimination against Mr. McCuistion including any acts inclined to black list him from employment in the nuclear power industry.

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(6) TVA is ordered to upgrade Mr. McCuistion's 1987 MAS from unsatisfactory to solid performer (or its equivalent) and to expunge from all its and complainant's personnel records entries of his unsatisfactory HAS.

(7) TVA is ordered to pay to Mr. McCuistion all reasonable expenses that he has incurred in pursuing his complaint to the Department of Labor, including all costs and reasonable attorneys' fees.

(8) Damages relating to health. The evidence is too limited for an evaluation of health damages and awarding compensation therefor.

Counsel for complainant is allowed 30 days within which to submit items of such expense together with itemization of attorneys' fees and costs.

TVA counsel is allowed 20 days thereafter for submission of comments thereon.

This Recommended Decision was rendered on February 1, 1990.

CLEMENT J. KICHUK
Administrative Law Judge

[ENDNOTES]

¹TVA is governed by a three person board of directors. Mr. Dean was chairman of the board at this time. Admiral Stephen White was head of TVA's Nuclear Power Program.

²Mr. Willoughby was a group leader instrumentation inspector who worked for Mr. McCuistion.

³Roy Anderson was the E, I and C supervisor and was Mr. McCuistion's immediate supervisor.

⁴Mr. Huddleston was a manager supervisor instrumentation inspector under Mr. McCuistion.

⁵CAQR'S are routine reports which document various perceived deficiencies or violations of TVA procedures at TVA's nuclear plants (McCuistion 4/24/89 Tr 64, Peterson 4/27/89 Tr at 251).

⁶Johnfred Carlton, manager in quality engineering, was Mr. Peterson's equal in the organizational chart at Watts Bar. They both reported directly to Mr. Johnson (Tr Peterson 4/27/89 p 249).

⁷Mr. Jim Moore was training coordinator for quality control at WNP (Tr McCuistion 4/24/89 p 76).

⁸The Employee Concerns Program was established in February 1986 so that TVA employees could raise safety issues as well as issues related to management and personnel. Ideally, the employee would first raise the issue with his or her supervisor and if the employee was unable to resolve the problem, then the employee concerns would be available. If the employee were concerned about reprisal, he/she received confidentiality. (Tr Brantley 4/27/89 p 232-233). Mr. Gerald Brantley was the employee site representative at Watts Barr.

⁹The NRC, a federal agency, regulates the nuclear industry nationwide, including enforcement of safety regulations (Willoughby 4/25/89 Tr 114-115).

¹⁰A management appraisal summary or MAS is a written evaluation of management performance. (Tr Johnson 4/27/89 p 53). (Tr McCuistion 4/25/89 p 34).

¹¹Paul Cochran, a manager in quality improvement at TVA's Sequoyah nuclear plant, has also worked at WNP on the management level. (Tr Cochran 4/26/89 p 260).

¹²Mr. Dean was chairman of the Board of Directors at TVA but is now a TVA board member.

¹³Brady Jones (formerly Brady Williamson) is a special agent with the inspector general's office at TVA in the department of nuclear investigations.

¹⁴Mr. Nixon was the manager of quality control at Bellafonte Nuclear Plant. Mr. Nixon is now the quality control supervisor at TVA's corporate office in Chattanooga. He has held

that position since approximately December 12, 1988. He has been employed at TVA since 1970 with an eleven month break in service. (Tr Nixon 6/6/89 p 7).

¹⁵Corporate Commencement Tracking System required by the NRC.